(2)
Supreme Court, U.S.
FILED
No. —— 99 689 OCT 25 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. McCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

22778

TABLE OF CONTENTS

APPENDIX A: Page

Opinion of the Supreme Court of New Jersey..... 1a

APPENDIX B:

Opinion of the Superior Court of New Jersey, Appellate Division 102a

APPENDIX C:

Opinion of the Superior Court of New Jersey, Chancery Division 155a

APPENDIX D:

N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l), and 10:5-5(hh) 255a

APPENDIX A

SUPREME COURT OF NEW JERSEY
September Term 1997

A-195/196

JAMES DALE,
Plaintiff-Respondent
and Cross-Appellant,

v.

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Defendants-Appellants
and Cross-Respondents.

Argued January 5, 1999—Decided August 4, 1999

On Certification to the Superior Court, Appellate Division

The opinion of the Court was delivered by PORITZ, C.J.

In 1991, the New Jersey Legislature amended the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49, to include protections based on "affectional or sexual orientation." This case requires us to decide whether that

law prohibits Boy Scouts of America (BSA) from expelling a member solely because he is an avowed homosexual.

Defendants BSA and Monmouth Council (collectively Boy Scouts) seek review of a decision of the Appellate Division holding that: (1) Boy Scouts is a place of public accommodation as defined by the LAD; (2) Boy Scouts' expulsion of plaintiff James Dale, as assistant scoutmaster, based solely on the club's policy of excluding avowed homosexuals from membership is prohibited by the LAD; and (3) the LAD prohibition does not violate Boy Scouts' First Amendment rights. Plaintiff, James Dale, seeks certification on his common law claim, dismissed by the Appellate Division. We granted both parties' petitions, —— *N.J.* —— (1999), and now affirm.

I

FACTS

A. *Boy Scouts of America*

1. *Organizational Structure and Programs* [1]

BSA, a federally chartered corporation, 36 *U.S.C.A.* § 30901, operates four scout membership programs: Cub Scouts (for boys eight to eleven-and-a-half), Boy Scouts (for boys and young men eleven to seventeen), Varsity Scouts (for young men fourteen to seventeen), and Explorers (for young men and women fourteen to twenty). In addition to these well-known membership programs, BSA publishes *Boys' Life*, *Exploring* and *Scouting* maga-

[1] Although not always specifically designated in the text, our description of Boy Scouts is derived primarily from the BSA Charter, Bylaws, and Rules and Regulations; the *Boy Scout Handbook* (10th ed. 1990); and the *Scoutmaster Handbook* (1990). These publications, taken together, provide a comprehensive view of the organization's structure, programs and missions.

zines, and offers an in-school scouting curriculum called Learning for Life that is taught in many schools throughout the country.

BSA membership is an American tradition. Since the program's inception in 1910 through the beginning of this decade, over eighty-seven million youths and adults have joined BSA. As of December 1992, over four million youths and over one million adults were active BSA members. BSA's success in attracting members is at least partly attributable to its long-standing commitment to a diverse and "representative" membership, as well as its aggressive recruitment through national television, radio, and magazine campaigns. BSA also organizes local membership drives, including "School Nights" conducted in cooperation with schools across the nation and held at school facilities.

This vast network of members is managed through a complex of national, regional and local organizations. The National Council is the highest BSA governing body. Its primary functions include "develop[ing] programs, set[ting] and maintain[ing] quality standards in training, leadership selection, uniform[s], registration records, literature development, and advancement requirements; and publish[ing] *Boy's Life* and *Scouting* magazines." BSA membership programs are also governed by regional committees that are further divided into area committees. Within each area, BSA accepts applications for the creation of local councils. Defendant, Monmouth Council, is one of sixteen local councils in New Jersey, and one of over four hundred local councils nationwide.

Each local council is made up of districts that are governed by district committees. BSA grants unit charters to individual sponsors in the districts consisting of "organizations and groups of citizens" that establish and "maintain units . . . and . . . issue certificates of member-

ship . . . to the officers and members thereof." Unit charters allow the "organization to use the Scouting program under its own leadership to serve the youth and families for which it has concern, to help it accomplish its own objectives." Individual units are based on age groupings and designated as Cub Scout Packs, Boy Scout Troops, Varsity Scout Teams, and Explorer Posts. In 1991, Monmouth Council chartered approximately 215 units comprised of nearly 8500 youth members and over 2700 adult members.

When deciding whether to grant an individual unit charter, BSA investigates "the general objectives, purpose, character, intent, and programs of the prospective chartered organization or community group and its compatibility with the aims and purposes of the Boy Scouts of America." In respect of established groups, BSA also considers the group's "history, length of service, and general reputation." Generally, BSA prefers granting unit charters to sponsors that are "existing organizations," *i.e.*, established religious, civic, or educational groups. In New Jersey, for example, public schools and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the military, sponsor approximately 250 scouting units in New Jersey. Sponsor approvals "obligate the organization to provide adequate facilities, supervision, and leadership for at least one year[,] and to make an effort to provide youth members with the opportunity for a quality program experience as set forth in the official literature of the Boy Scouts of America."

A unit charter is renewed annually, "upon application, provided a review of past activities, personnel, and plans for the future shows a satisfactory effort to carry out the

scouting program, as set forth in the official handbooks, and [demonstrates compliance] with the Rules and Regulations of the Boy Scouts of America."[2] Each chartered unit is supervised by a "unit committee, consisting of three or more qualified adults, 21 years of age or over, selected by the organization with which the unit is connected, or in the case of a community unit[,] of those who make application for the unit charter, one of whom [is] designated as chairman." In Monmouth Council, the units are run by approximately 3000 volunteer leaders and four paid scouting professionals. Of the 3000 volunteers, some 340 are assistant scoutmasters

Acording to BSA's federal charter, BSA seeks "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." BSA's Mission Statement also describes BSA's purpose: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." The Scout Oath and Scout Law set forth the guiding principles of BSA:

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

---

[2] Although a relatively small percentage of New Jersey unit charters are not renewed each year, we are unaware of applicants having been rejected because of their expressed views on any subject.

Scout Law

A Scout is TRUSTWORTHY. A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.

A Scout is LOYAL. A Scout is true to his family, friends, Scout leaders, school, nation, and world community.

A Scout is HELPFUL. A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.

A Scout is FRIENDLY. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own.

A Scout is COURTEOUS. A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along together.

A Scout is KIND. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not harm or kill anything without reason.

A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

A Scout is CHEERFUL. A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.

A Scout is THRIFTY. A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.

A Scout is BRAVE. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.

A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

A Scout is REVERENT. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

In its briefs below and to this Court, Boy Scouts claims that the language "morally straight" and "clean" in the Oath and Law, respectively, constitutes a rejection of homosexuality. The *Boy Scout Handbook, supra,* at 551, defines "morally straight" as follows:

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

The *Boy Scout Handbook* also defines "clean":

> A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.

> You never need to be ashamed of dirt that will wash off. . . .
>
> There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are the targets of insults.

[*Id.* at 561.]

Although one of BSA's stated purposes is to encourage members' ethical development, BSA does not endorse any specific set of moral beliefs. Instead, "moral fitness" is deemed an individual choice:

> Morality . . . concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by *our* conscience or ethical judgment." . . .
>
> In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what *his* head and *his* heart tell him is right. And the courage to refuse to do what *his* heart and *his* head say is wrong.

[*Scoutmaster Handbook*, *supra*, at 71 (emphasis added) (additional internal quotations omitted).]

BSA also does not espouse any one religion, explaining in the *Scoutmaster Handbook* that "[t]here is a close association between the Boy Scouts of America and virtually all religious bodies and denominations in the United

States." *Id.* at 227. Consistent with its nonsectarian nature, BSA Bylaws require "respect [for] the convictions of others in matters of custom and religion." Boy Scouts "encourages no particular affiliation, [and does not] assume[] [the] functions of religious bodies," *ibid.*; indeed, in a training manual entitled *Scoutmaster Fundamentals* prepared "for Scoutmasters, Assistant Scoutmasters, Troop Committee members, and parents," BSA categorically states: "Religious instruction is the responsibility of the home and church."

A large and diverse group of religions that subscribe to many different and sometimes contradictory beliefs sponsor BSA units throughout the United States. Some of those sponsors have participated in this case as *amici curiae*, taking a variety of positions in respect of homosexuality, *i.e.*, that homosexuality is "immoral"; that "discrimination based upon sexual orientation" is to be "strongly condemn[ed]." BSA, however, encourages its leaders to refrain from talking about sexual topics. Although the *Boy Scout Handbook*, *supra*, at 528, contains a subchapter entitled "Sexual Responsibility" which states that "[f]or the followers of most religions, sex should take place only between married couples," sexual topics are not formally discussed during Boy Scout activities. Rather, BSA "believes that boys should learn about sex and family life from their parents, consistent with their spiritual beliefs."

2. *Boy Scout Troops*

In 1992, of the five million members of BSA, approximately one million youths and 420,000 adults were involved in the Boy Scout division. Those members belonged to over 44,000 Boy Scout troops throughout the country.

According to the *Boy Scout Handbook, id.* at 2, a boy may become a Boy Scout if he "has completed the fifth grade, or . . . has earned the Arrow of Light Award, or [is at least] 11 years of age but not yet 18" and "[c]omplete[s] the Boy Scout joining requirements." The Boy Scout joining requirements call for the applicant to:

> Submit a completed Boy Scout application and health history signed by [a] parent or guardian.
>
> Repeat the Pledge of Allegiance.
>
> Demonstrate the Scout salute, sign, and handclasp.
>
> Show how to tie the square knot.
>
> Understand and agree to live by the Scout Oath, the Scout Law, the Scout motto, the Scout slogan, and the Outdoor Code.
>
> Describe the Scout badge.
>
> With [a] parent or guardian, complete the exercises in the pamphlet *How to Protect Your Children from Child Abuse and Drug Abuse.*
>
> Participate in a Scoutmaster conference.

[*Id.* at 4.]

Adult applicants are also subject to joining requirements. They must be recommended by the troop representative and approved by the local council, and they must subscribe to the Declaration of Religious Principle,[3] the

---

[3] BSA's Declaration of Religious Principle states:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. . . . No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude

> Scout Oath and the Scout Law. Once an adult member is approved, that person is also qualified to be a leader. Boy Scouts explains that the terms "adult membership and adult leadership. . . . are interchangeable . . . since adults . . . have no other reason to join apart from leadership in service to boys."

B. *James Dale*

James Dale first became a BSA member in 1978 when, at the age of eight, he joined Monmouth Council's Cub Scout Pack 142. He remained a Cub Scout until 1981, when he became a member of Boy Scout Troop 220, also in Monmouth Council. He joined Monmouth Council's Boy Scout Troop 128 in 1983, and Troop 73 in 1985. Until his eighteenth birthday in 1988, he remained a youth member of Troop 73.

Dale was an exemplary scout. Over the ten years of his membership, he earned more than twenty-five merit badges. In 1983, he was admitted into Boy Scouts' Order of the Arrow, the organization's honor camping society, and achieved the status of Virgil Honor. The pinnacle of Dale's career as a youth member came in 1988, when BSA awarded him an Eagle Scout Badge, an honor achieved by only the top three percent of all scouts.

Dale's participation in Boy Scout leadership began at an early age. Throughout his years as a member, Dale was an assistant patrol leader, patrol leader, and bugler, and from 1985 to 1988, Dale served as a Junior Assistant Scoutmaster for Troop 73. He was also invited to speak at organized Boy Scout functions, such as the Joshua Huddy Distinguished Citizenship Award Dinner,

---

> toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

and attended national events, including the National Boy Scout Jamboree. On March 21, 1989, Dale sought adult membership in Boy Scouts. Monmouth Council and BSA accepted and approved his application for the position of Assistant Scoutmaster of Troop 73 where he served for approximately sixteen months.

At about the same time that Dale applied for adult membership, he left home to attend Rutgers University. While at college, Dale first acknowledged to himself, and to his family and friends, that he was gay. Shortly thereafter, he became involved with, and eventually became the co-president of the Rutgers University Lesbian/Gay Alliance. Then, in July 1990, Dale attended a seminar that addressed the psychological and health needs of lesbian and gay teenagers. The *Star-Ledger* interviewed Dale and published an article on July 8, 1990 that discussed the seminar. The article included Dale's photograph and a caption identifying him as "co-president of the Rutgers University Lesbian/Gay Alliance." Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens, Star-Ledger* (Newark), July 8, 1990, § 2, at 11.

Later that month, Dale received a letter from Monmouth Council Executive James W. Kay, revoking his BSA membership. The letter asked Dale to "sever any relations [he] may have with the Boy Scouts of America," and granted Dale sixty days to request a review of his termination from the Monmouth Council Regional Review Committee.

Dale wrote to Kay on August 8, 1990, and requested the basis for the Monmouth Council's decision. In a letter dated August 10, 1990, Kay notified Dale that the "grounds for [his] membership revocation" were "the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homo-

sexuals."[4] On September 30, 1990, Dale wrote a letter to the Northeast Regional Director, Rudy Flythe, asking for a review of his membership decision and a copy of BSA's leadership standards. Dale also requested permission to attend the review, a right to which he was entitled under the Monmouth Council Review Procedures. The Regional Review Committee acknowledged receipt of Dale's request, but neglected to provide him with a copy of the BSA standards for leadership or a review date.

In another letter dated October 16, 1990, Dale once again asked for a copy of the leadership standards and notice of the review date. On November 27, 1990, Charles Ball, the Assistant Regional Director of the Northeast Region, notified Dale that the "Northeast Region, [BSA] Review Committee supports the decision of the Monmouth Council . . . to deny your registration with [BSA]," and granted Dale thirty days to seek review by the National Council Review Committee. Three weeks later, through counsel, Dale wrote to the Chief Scout Executive of BSA and requested a rehearing and an opportunity to attend the review. BSA's counsel informed Dale on December 21, 1990, that he had been denied the right to attend because: "[BSA] does not admit avowed homosexuals to membership in the organization so no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting." BSA did agree, however, to have the National Council review Dale's membership revo-

---

[4] Dale subsequently learned that in 1978 BSA had prepared a position paper stating that "an individual who openly declares himself to be a homosexual [may not] be a volunteer scout leader [or] . . . a registered unit member[.]" The position paper "was never distributed." Statements were also written in 1991 and 1993 expressing similar positions. These statements were written after the onset of litigation in other states charging the organization with discrimination against members on the basis of sexual orientation.

cation. Because Dale believed that a National Council review "would be futile," he initiated these legal proceedings.

II

PROCEDURAL HISTORY

On July 29, 1992, Dale filed a six-count complaint against BSA and Monmouth Council in the Superior Court of New Jersey. Dale alleged that Boy Scouts had violated the New Jersey Law Against Discrimination and common law by revoking his membership based solely on his sexual orientation. He sought declaratory, injunctive, compensatory and punitive monetary relief, as well as costs and attorney fees.

A. *Chancery Division*

Dale moved for partial summary judgment in September 1993, demanding immediate reinstatement based on his claim that defendants had violated the LAD and New Jersey's public policy. Defendants, in response, cross-moved for summary judgment on all counts. The court denied Dale's motion and granted Boy Scouts' cross-motion. *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995). After concluding that Dale was "a sexually active homosexual," the court found that Boy Scouts had always had a policy of excluding "active homosexual[s]." *Id.* at 6, 38. The court opined that homosexual acts are immoral and attributed to Boy Scouts a longstanding antipathy toward such behavior. *Id.* at 39-40. In the judge's view, "[i]t [was] unthinkable . . . that the BSA could or would tolerate active homosexuality if discovered in any of its members." *Id.* at 40.

As to the applicability of the LAD, the court held that Boy Scouts was not a place of public accommodation, or

alternatively, that Boy Scouts was exempt under the "distinctly private" exception found at *N.J.S.A.* 10:5-51. *Id.* at 55. The court rejected Dale's common law claim, finding that the State's policy "is that established by the NJLAD . . . [and] not some prior common law policy." *Id.* at 45. Because the court believed that Boy Scouts' moral position in respect of active homosexuality was clear, it found that Boy Scouts' First Amendment freedom of expressive association "prevent[ed] government from forcing [the organization] to accept Dale as an adult leader-member." *Id.* at 71.

B. *Appellate Division*

The Appellate Division affirmed the dismissal of Dale's common law claim, but otherwise reversed and remanded for further proceedings. *Dale v. Boy Scouts of Am.*, 308 *N.J. Super.* 516, 523 (App. Div. 1998). In a separate opinion, Judge Landau concurred with the majority's holding that Boy Scouts should restore Dale's membership, but dissented from the majority "to the extent it would compel the Boy Scouts to accept . . . Dale . . . [in] any Scout leadership position." *Id.* at 564.

The majority held that Boy Scouts, a "place of public accommodation," had violated the LAD by denying Dale the "privilege" of serving as a volunteer assistant scoutmaster based solely on his sexual orientation. Boy Scouts was a "public accommodation" because it "invite[d] 'the public at large,'" was "dependent upon the broad-based participation of members of the general public," "engage[d] in advertising and public promotion," shared "many attributes in common with" the places and activities enumerated in the LAD, and had "historic[ally] partner[ed] with various public entities and public service organizations." *Id.* at 536, 539. "For the [same] reasons," the court "summarily" rejected Boy Scouts' argu-

ment that it was exempt from the LAD under the "distinctly private" exception. *Id.* at 540. The court dismissed Dale's common law claim, finding Dale had "not demonstrate[d] that a common law cause of action would vindicate any additional interests." *Id.* at 543. Consequently, the common law claim was held merely "duplicative of the LAD claim." *Id.* at 541.

On Boy Scouts' federal constitutional claims, the Appellate Division ruled that Boy Scouts was not protected by either the right to freedom of intimate association or to expressive association "inferred from other rights and protections guaranteed by the constitution" and found in the First Amendment. *Id.* at 544-45. The court quickly disposed by Boy Scouts' freedom of intimate association argument, observing that the organization "consists of nearly 5,000,000 members[,] . . . is open to all boys[,] . . . engages in aggressive advertising and undertakes a variety of special interest activities in schools and other public forums." *Id.* at 546. Based on those characteristics, the court held that Boy Scouts "lacks the distinctive qualities that might afford constitutional protections under this component of the First Amendment." *Ibid.*

In respect of Boy Scouts' freedom of expressive association claim, the majority "conclude[d] that enforcement of the LAD by granting plaintiff access to the accommodations afforded by scouting will not affect in 'any significant way' BSA's ability to express [its] views and to carry out [its] activities." *Id.* at 550. Noting "the tension between the freedom to associate for the purpose of expressing fundamental views and the compelling state interest in eradicating discriminaton," the court found that the "organization or club asserting the freedom has a substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory

practice." *Id.* at 548. Although the court accepted the argument that the First Amendment protects Boy Scouts' goals and activities, it determined that the relationship between Boy Scouts' stated goals and Boy Scouts' exclusionary practice was not significant enough to overcome the compelling state interest in eradicating invidious discrimination. *Id.* at 549-50.

In its analysis, the Appellate Division focused on Boy Scouts' " 'expressive purpose,' [which] is not to condemn homosexuality," but to "instill values in young people." *Id.* at 549, 550. The court found that "enforcement of the LAD by granting plaintiff access to the accommodations afforded by scouting will not affect in 'any significant way' [Boy Scouts'] ability to express these views and to carry out these activities." *Id.* at 550. The court observed that the LAD "does not aim at the suppression of speech," and "[n]othing . . . suggests that a male, simply because he is gay, will somehow undermine [Boy Scouts'] fundamental beliefs and teachings." *Id.* at 550, 552. Boy Scouts' 1991 and 1993 position statements were rejected as representations of the "collective 'expression' " of Boy Scouts because these papers were issued at "a time when [Boy Scouts'] anti-gay policy was subject to judicial challenge in California"; "such policy [had] not been incorporated into [Boy Scouts'] bylaws, rules, regulations and handbooks"; the position expressed "hardly squares with the view shared by a substantial percentage of church groups who sponsor local boy scout troops"; and Boy Scouts "has not attempted to exclude" religious institutions and heterosexual scouts who "have condemned [Boy Scouts'] anti-gay policy." *Id.* at 554-55, 556.

The Appellate Division distinguished *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 *U.S.* 557, 115 *S.Ct.* 2338, 132 *L. Ed.* 2d 487 (1995), a case that held parade organizers have "the

autonomy to choose the content of [their] own message," *id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503. The court pointed out that, unlike *Hurley, Dale* does not involve "pure forms of speech" or a "plaintiff [who] is . . . asserting a right . . . to alter the content of [Boy Scouts'] viewpoint." *Dale, supra,* 308 *N.J. Super.* at 559, 560. The court refused to accept Boy Scouts' allegation that Dale's "public declaration that he is gay in and of itself constitutes 'expressive activity' sufficient to forfeit his entitlement to membership in the BSA." *Id.* at 560. "In [the court's] view, there is a patent inconsistency in the notion that a gay scout leader who keeps his 'secret' hidden may remain in scouting and one who adheres to the scout laws by being honest and courageous enough to declare his homosexuality publicly must be expelled." *Ibid.*

Judge Landau concurred with the majority's determination that Dale's adult membership could not be terminated, but dissented on whether Dale could be removed from his leadership position in the troop. Although Judge Landau refused to look behind Boy Scouts' claim that its "fundamental" message would be altered if an avowed homosexual served as an assistant scoutmaster, *id.* at 563, in his view Boy Scouts' message was ultimately irrelevant. According to Judge Landau, "Boy Scouts['] . . . right of unfettered advocacy" is violated when Dale is reinstated as a leader "whether or not the Boy Scouts' stand on homosexuality is fundamental to that organization's creation." *Id.* at 564.

III

STATE LAW CLAIMS

A. *The LAD*

We first consider whether Boy Scouts is subject to the LAD, which provides that "[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of . . . affectional or sexual orientation." *N.J.S.A.* 10:5-4. Boy Scouts must therefore abide by the LAD if Boy Scouts is a place of public accommodation and does not meet any of the LAD exceptions. *See, e.g., N.J.S.A.* 10:5-51 (exempting "distinctly private" entities, religious educational facilities, and parents or individuals acting "in loco parentis" in respect of "the education and upbringing of a child").

1. *Place of Public Accommodation*

"[T]he overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman,* 109 *N.J.* 319, 334 (quoting *Jackson v. Concord Co.,* 54 *N.J.* 113, 124 (1969)), *cert. denied,* 488 *U.S.* 826, 109 *S. Ct.* 75, 102 *L. Ed.* 2d 51 (1988). "[D]iscrimination threatens not only the rights and proper privileges of the inhabitants of [New Jersey,] but menaces the institutions and foundation of a free democratic State." *N.J.S.A.* 10:5-3. In furtherance of its purpose to root out discrimination, the Legislature has directed that the LAD "shall be liberally construed." *Ibid.* We have adhered to that legislative mandate by historically and consistently interpreting the LAD "'with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.'" *Andersen v. Exxon Co.,* 89 *N.J.* 483, 495 (1982) (quoting *Passaic Daily News v. Blair,* 63 *N.J.* 474, 484 (1973)).

A clear understanding of the phrase "place of public accommodation" is critical. That is because "place of public accommodation" is, in large measure, determinative of the LAD's scope. Certainly, if the statute is broadly applicable, the antidiscriminatory impact of its provisions is greater. The Legislature's finding that the effects of

discrimination are pernicious, and its directive to liberally construe the LAD, has informed our cases interpreting the reach of "place of public accommodation."

a. *Place*

In 1965, the Court held that places of public accommodation were not limited to those enumerated in the statute. *Fraser v. Robin Dee Day Camp*, 44 *N.J.* 480, 486 (1965) (then *N.J.S.A.* 18:25-5(l)). At that time, the statutory definition used the word "include" to preface a list of specific "places" of public accommodation. *See id.* at 485. We reasoned that the Legislature's choice of the word "include" indicated that the "places" expressly mentioned were "merely illustrative of the accommodations the Legislature intended to be within the scope of the statute. Other accommodations, similar in nature to those enumerated, were also intended to be covered." *Id.* at 486. Less than a year later, the Legislature amended the LAD to expressly state that " 'a place of public accommodation' shall include; *but not be limited to*" the various examples identified, *L.* 1966, *c.* 17 (emphasis added). thereby reaffirming our broad construction of the statutory language.[5]

---

[5] *N.J.S.A.* 10:5-51 now reads:

"A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air,

Later, the word "place" became a further source of legal dispute. In *National Organization of Women v. Little League Baseball, Inc.*, 67 *N.J.* 320 (1974), we affirmed the decision of the Appellate Division holding that: "[t]he statutory noun 'place' . . . is a term of convenience, not of limitation [,] . . . employed to reflect the fact that public accommodations are commonly provided at fixed 'places.' " 127 *N.J. Super.* 522, 531 (App. Div. 1974). The defendant in *Little League* was a chartered baseball league that excluded girls between the ages of eight and twelve years from participation in its programs. The league contended that it did not come "within the meaning of the statute, primarily because it [was] a membership organization which does not operate from any fixed parcel of real estate in New Jersey of which it had

---

any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students.

exclusive possession by ownership or lease." *Id.* at 530. The court rejected that narrow view of "place":

> The "place" of public accommodation in the case of Little League is obviously the ball field at which try-outs are arranged, instructions given, practices held and games played. The statutory "accommodations, advantages, facilities and privileges" at the place of public accommodation is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.

[*Id.* at 531 (citations omitted).]

In New Jersey, "place" has been more than a fixed location since 1974.

As Boy Scouts correctly observes, other jurisdictions interpreting their antidiscrimination laws have found "place" to be a limiting factor encompassing only a fixed location. *See, e.g., Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267, 1269 (7th Cir.) (holding that Boy Scouts is not "place of public accommodation" under Title II of Civil Rights Act of 1964 because "Congress when enacting § 2000a(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of 'place of public accommodation' "), *cert. denied*, 510 *U.S.* 1012, 114 *S. Ct.* 602, 126 *L. Ed.* 2d 567 (1993); *United States Jaycees v. Richardet*, 666 *P.*2d 1008, 1011 (Alaska 1983) (stating that "the word 'place' . . . would not encompass a service organization lacking a fixed geographical situs"); *United States Jaycees v. Bloomfield*, 434 *A.*2d 1379, 1381 (D.C. 1981) (disagreeing with lower court's conclusion that "it is not necessary that there be a building . . . in order to categorize an existing entity as

a place of public accommodation"); *United States Jaycees v. Iowa Civil Rights Comm'n*, 427 *N.W.*2d 450, 454 (Iowa 1988) (stating that "United States Jaycees is not a 'place' within our definition of 'public accommodation' "); *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 463 *N.E.*2d 1151, 1156 (Mass. 1984) (finding that Massachusetts antidiscrimination law "does not apply to [a] membership organization, since such an organization does not fall within the commonly accepted definition of 'place' ").

We observe that not all jurisdictions have interpreted "place" so narrowly. The New York Court of Appeals has held that a "place of public accommodation need not be a fixed location, it is the place where petitioners do what they do," including "the place where petitioners' meetings and activities occur." *United States Power Squadrons v. State Human Rights Appeal Bd.*, 452 *N.E.*2d 1199, 1204 (N.Y. 1983). The Supreme Court of Minnesota has also approved a flexible construction of the term "place." In *United States Jaycees v. McClure*, 305 *N.W.*2d 764, 773 (Minn. 1981), the Minnesota court agreed with the *Little League* premise that a " 'place of public accommodation' . . . is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation."

Despite numerous additions and modifications to the LAD in the twenty-four years since *Little League* was decided, the New Jersey Legislature has not enacted a limiting definition of place. *See Massachusetts Mutual Life Ins. Co. v. Manzo*, 122 *N.J.* 104, 116 (1991) (stating that "[t]he Legislature's failure to modify a judicial determination, while not dispositive, is some evidence of

legislative support for the judicial construction of a statute . . . . [especially when] the Legislature has amended [the] statute several times without altering the judicial construction"). We decline now to construe "place" so as to include only membership associations that are connected to a particular geographic location or facility. As the Appellate Division has so aptly pointed out, "[to] have the LAD's reach turn on the definition of 'place' is irrational because 'places do not discriminate; people who own and operate places do.'" *Dale, supra,* 308 *N.J. Super.* at 533 (quoting *Welsh, supra,* 993 *F.*2d at 1282 (Cummings, J., dissenting)). A membership association, like Boy Scouts, may be a "place" of public accommodation even if the accommodation is provided at "a moving situs." *Little League, supra,* 127 *N.J. Super.* at 531. In this case it is readily apparent that the various locations where Boy Scout troops meet fulfill the LAD "place" requirement.

b. *Public Accommodation*

Our case law identifies various factors that are helpful in determining whether Boy Scouts is a "public accommodation." We ask, generally, whether the entity before us engages in broad public solicitation, whether it maintains close relationships with the government or other public accommodations, or whether it is similar to enumerated or other previously recognized public accommodations.

Broad public solicitation has consistently been a principal characteristic of public accommodations. Our courts have repeatedly held that when an entity invites the public to join, attend, or participate in some way, that entity is a public accommodation within the meaning of the LAD. *See, e.g., Clover Hill Swimming Club, Inc. v. Goldsboro,* 47 *N.J.* 25, 33 (1966) (stating that "[a]n establishment which by advertising or otherwise extends an invitation

to the public generally is a place of public accommodation"); *Sellers v. Philip's Barber Shop,* 46 *N.J.* 340, 345 (1966) (stating that "[a]n establishment which caters to the public or by advertising or other forms of invitation induces patronage generally is a place of public accommodation"); *Fraser, supra,* 44 *N.J.* at 488 (stating that "[i]n light of the nature of the facilities and activities offered to the general public by respondent's day camp, we hold that it is a public accommodation"); *Little League, supra,* 127 *N.J. Super.* at 531 (stating that "Little League is a public accommodation because the invitation is open to children in the community at large"); *Evans v. Ross,* 57 *N.J. Super.* 223, 231 (App. Div.) (stating that LAD requires "an establishment which caters to the public, and by advertising or other forms of invitation induces patronage generally, [not to] refuse to deal with members of the public who have accepted the invitation"), *certif. denied,* 31 *N.J.* 292 (1959); *see also Kiwanis Int'l v. Ridgewood Kiwanis Club,* 806 *F.*2d 468, 475 (3d Cir. 1986) (stating that LAD applies whenever "the organization or club . . . invite[s] an unrestricted and unselected public to join as members"); *Brounstein v. American Cat Fanciers Ass'n,* 839 *F. Supp.* 1100, 1107 (D.N.J. 1993) (stating that "'primary [public accommodation] consideration'" under LAD is "'whether the invitation to gather is open to the public at large'") (quoting *Kiwanis Int'l, supra,* 806 *F.*2d at 474).

BSA engages in broad public solicitation through various media. In 1989, for example, BSA spent more than $1 million on a national television advertising campaign. A *New York Times* article describes one of Boy Scouts' "hip" television ads, quoting a BSA spokesman as stating, "scouting [is] a product and we've got to get the product into the hands of as many consumers as we

can."[6] Kim Foltz, *TV Ad's Hip Pitch: It's 'Cool' to be a Boy Scout, N.Y. Times,* Oct. 30, 1989. BSA has also advertised in widely distributed magazines, such as *Sports Afield* and *Redbook*. Local Boy Scout councils engage in substantial public solicitation. BSA frequently supplies the councils with recruiting materials, such as television and radio public service announcements, advertisements, and other promotional products. Monmouth Council, in particular, has expressly invited the public by conducting recruiting drives and by providing local troops with BSA-produced posters and promotions aimed at attracting new members.

Boy Scout troops also take part in perhaps the most powerful invitation of all, albeit an implied one: the symbolic invitation extended by a Boy Scout each time he wears his uniform in public. *See Sellers, supra,* 46 *N.J.* at 345 (finding that barber shop's pole extended implied invitation to public). A boy in a uniform may well be Boy Scouts' strongest recruiting tool. By encouraging scouts to wear their uniforms to school, and when participating in "School Nights" and public demonstrations, Boy Scouts invites the curiosity and awareness of others in the community. Boy Scouts admits that it encourages these displays in the hope of attracting new members.

On the facts before us, it cannot be controverted that Boy Scouts reaches out to the public in a myriad of ways designed to increase and sustain a broad membership base. Whether by advertising or active recruitment, or through

---

[6] Boy Scouts expresses concern that this article is not properly part of the record before us. Although the quoted statement has not been authenticated, we find it descriptive of material in the record respecting BSA's public solicitation and membership recruitment efforts.

the symbolism of a Boy Scout uniform, the intent is to send the invitation to as many members of the general public as possible. Once Boy Scouts has extended this invitation, the LAD requires that all members of the public must "have equal rights . . . and not be subjected to the embarrassment and humiliation of being invited [,] . . . only to find [the] doors barred to them." *Evans, supra,* 57 *N.J. Super.* at 231.

Boy Scouts is a "public accommodation," not simply because of its solicitation activities, but also because it maintains close relationships with federal and state governmental bodies and with other recognized public accommodations. Our cases have held that certain organizations that benefit from relationships with the government and other public accommodations are themselves places of public accommodation within the meaning of the LAD. In *Little League*, for example, the court concluded that Little League was "public in the added sense that local governmental bodies characteristically make the playing areas available to the local leagues, ordinarily without charge." 127 *N.J. Super.* at 531, *aff'd,* 67 *N.J.* 320 (1974). More recently, in *Frank v. Ivy Club*, 120 *N.J.* 73, 79, 110 (1990), a female student sought membership in the all-male eating clubs at Princeton University. Although they did not publicly solicit new members, we held that the clubs' close relationship to the University, a place of public accommodation, rendered them subject to the LAD. *Id.* at 110.

It is clear that Boy Scouts benefits from a close relationship with the federal government. Indeed, BSA was chartered by Congress in 1916, 36 *U.S.C.A.* § 30901, and has been the recipient of equipment, supplies, and services from the federal government, also by act of Congress, 10 *U.S.C.A.* § 2544. Thus, the Secretary of De-

fense, 10 *U.S.C.A.* § 2544(a), and other departments of the federal government, 10 *U.S.C.A.* § 2544(h), have been authorized to

> lend to the Boy Scouts of America, for the use and accommodation of Scouts, Scouters, and officials who attend any national or world Boy Scout Jamboree, such cots, blankets, commissary equipment, flags, refrigerators, and other equipment and without reimbursement, furnish services and expendable medical supplies, as may be necessary or useful to the extent that items are in stock and items or services are available.

[10 *U.S.C.A.* § 2544(a).]

Since its inception, BSA has maintained a special association with each successive President of the United States. According to a BSA public relations fact sheet:

> One of the causes contributing to the success of the Boy Scouts of America has been the thoughful, wholehearted way in which each President of the United States since William Howard Taft in 1910 has taken an active part in the work of the movement. Each served as Honorary President during his term in office.

Another fact sheet states that seventy-eight percent of the members of the 100th Congress participated in scouting.

Boy Scouts also maintains a close relationship with the military. According to a BSA pamphlet entitled *Organizations That Use Scouting*, "military personnel serve Scouting in many capacities." "At many [Army, Navy, Air Force, and National Coast Guard] installations, facilities are available for Scouting shows, meetings, training activities," and other "similar Scouting events." Monmouth Council, in particular, has used the New Jersey military installation known as Fort Monmouth.

Likewise, state and local governments have contributed to Boy Scouts' success.[7] In New Jersey, the Legislature has authorized the Division of Fish, Game and Wildlife in the Department of Environmental Protection to "stock with fish any body of water in this state that is under the control of and for the use of . . . Boy Scouts," *N.J.S.A.* 23:2-3, and has exempted Boy Scouts from having to pay motor vehicle registration fees, *N.J.S.A.* 39:3-27. Local governmental agencies, such as fire departments and law enforcement agencies, serve Boy Scouts by sponsoring scouting units. Nationally, over 50,000 youth members belong to units sponsored by fire departments, whereas in New Jersey alone over 130 units are sponsored by fire departments and over 100 units are sponsored by law enforcement agencies.

Perhaps Boy Scouts' connection to public schools and school-affiliated groups constitutes its single most beneficial governmental relationship. *Organizations That Use Scouting* advises that "the education field holds our greatest potential." Boy Scouts currently recruits many of its members through its presence in and use of school facilities. A large percentage of scouting units nationally, as well as in New Jersey, are chartered by public schools and affiliated organizations.

Moreover, public schools and community colleges often host scouting meetings, activities, and recruiting events such as "School Nights." "School Night for Scouting [is a] recruiting plan operated by many councils in connection with the schools." Under this plan, an open scout

---

[7] New Jersey governmental entities are, of course, bound by the LAD. Their sponsorship of, or conferring of special benefits on, an organization that practices discrimination would be prohibited.

meeting is held at a school in order to encourage students to join scouting. Public schools not only aid Boy Scouts by allowing the organization to use their facilities after school, but also during the school day. According to Boy Scouts, "[m]ore and more of our schools are becoming available for other than formal education. . . . In-school Scouting, where the pack, troop, team, or post meets during the school day, is recognized in many areas." In 1992, close to 700,000 students throughout the nation were taught the Boy Scouts' Learning for Life curriculum during the school day.

Given Boy Scouts' public solicitation activities, and considering its close relationship with governmental entities, it is not surprising that Boy Scouts resembles many of the recognized and enumerated places of public accommodation. Similarity to the places of public accommodation listed in the LAD has been a benchmark for determining whether the unlisted entity should be included. *Cf. Board of Chosen Freeholders v. New Jersey*, —— *N.J.* ——, —— (slip op. at 16) (1999) (stating that "[u]nder the *ejusdem generis* principle of statutory construction, when specific words follow more general words in a statutory enumeration, we can consider what additional items might also be included by asking whether those items are similar to those enumerated"). In *Fraser v. Robin Dee Day Camp*, for example, this Court held that a "day camp is the type of accommodation which the Legislature intended to reach" because a "day camp offers accommodations which have many attributes in common with swimming pools, recreation and amusement parks, motion picture houses, theatres, music halls, gymnasiums, kindergarten and primary schools, all of which are specifically enumerated" in the LAD. 44 *N.J.* at 487. The Appellate Division in *Little League* identified Little League's " 'educational or recreational nature' " as a basis

for the court's conclusion that Little League was similar to the types of public accomodations listed in the statute. 127 *N.J. Super.* at 531 (quoting *Fraser, supra,* 44 *N.J.* at 487). Similarly, Boy Scouts' educational and recreational nature, like the day camp in *Fraser* or the baseball teams in *Little League,* further supports our conclusion that Boy Scouts is a "place of public accommodation" under the LAD. *See, e.g, Advancement Guidelines* 4 (1992 ed.) (stating that "[e]ducation and fun are functions of the scouting movement").

2. *LAD Exceptions*

Boy Scouts claims that even if it is a place of public accommodation, it is nonetheless exempt from the LAD under three express exceptions: (1) the "distinctly private" exception; (2) the religious educational facility exception; and (3) the *in loco parentis* exception. *N.J.S.A.* 10:5-51. Because we determine that these exceptions do not apply to Boy Scouts, we hold that Boy Scouts is subject to the LAD.

"While this Court has been scrupulous in its insistence that the [LAD] be applied to the full extent of its facial coverage, it has never found such coverage to exist in the face of an unambiguous exclusion." *Peper v. Princeton Univ. Bd. of Trustees,* 77 *N.J.* 55, 68 (1978) (citations omitted). Nonetheless, despite our adherence to statutory exceptions expressly and unambiguously set forth by the Legislature, we are mindful that "[e]xemptions from remedial statutes should generally be narrowly construed." *Poff v. Caro,* 228 *N.J. Super.* 370, 379 (Law Div. 1987) (citing *Service Armament Co. v. Hyland,* 70 *N.J.* 550, 559 (1976)).

We begin with the "distinctly private" exception. The LAD provides that "[n]othing herein contained shall be

construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." *N.J.S.A.* 10:5-51. Boy Scouts' status as a bona fide club has not been questioned. Our focus is, therefore, on the meaning of "distinctly private." We agree with the New York Court of Appeals that this language, found in both the New York Human Rights Law, *N.Y. Exec. Law* § 292, and in the LAD, is intended as a narrowly drawn statutory exclusion. *Power Squadrons, supra,* 452 *N.E.*2d at 1204 (stating that this exception "does not refer simply to private clubs or establishments closed to the public but uses more restrictive language excluding from the statute's provisions only clubs which are "distinctly private' "). Boy Scouts bears the burden of proving that it fits within this narrow exception. *Cf. Spragg v. Shore Care & Shore Mem'l Hosp.*, 293 *N.J. Super.* 33, 51 (App. Div. 1996) (holding burden of proof on defendant-employer to prove bona fide occupational qualification exception to LAD).

In deciding whether Boy Scouts is a place of public accommodation, we considered the organization's public solicitation activities. Solicitation of a broad membership base is closely related to the issue of selectivity in membership, which may explain why various courts have considered both factors in their analyses of both "place of public accommodation" and the "distinctly private" exception. *See, e.g., Kiwanis, supra,* 806 *F.*2d at 476 (stating that "distinctly private" exception "represents the other side of the 'public accommodation' coin . . . . because of the emphasis placed on 'selectivity' as the standard for determining 'public accommodation,' as well as for determining if a club is 'distinctly private' "). We have reviewed the multiple ways in which Boy Scouts reaches out to the public and, therefore, will consider the selectivity issue as the principal determinant of "distinctly private"

status. *See Power Squadrons, supra,* 452 *N.E.*2d at 1204 (stating that "the essence of a private club is selectivity in its membership").

Thirty-three years ago, in *Clover Hill Swimming Club, Inc. v. Goldsboro,* we said that "not every establishment using the 'club' label can be considered 'distinctly private.' Self-serving declarations by . . . an accommodation are not determinative of its character." 47 *N.J.* at 34. Although the swimming club had represented to the public that "all applications [for membership] would be subject to approval by club officials," it appeared that Clover Hill was only selective when black families applied. *Ibid.* The Court refused to accept bogus representations concerning the "private" nature of the club when it was quite clear that membership was generally open and had to do with a family's interest in recreation and not much else. *Ibid. Little League,* citing *Clover Hill,* primarily relied on the baseball league's "open [invitation] to children in the community at large, with no restriction (other than sex) whatever" as a basis for the court's finding that the league was a "public accommodation." 127 *N.J. Super.* at 531. The lack of any membership selectivity—except for the prohibition against the admission of girls—weighed in the public accommodation calculus; it also bears upon the "distinctly private" exception.

Kiwanis International v. Ridgewood Kiwanis Club is the only case to hold a club exempt under the "distinctly private" exception. 806 *F.*2d at 477. The Third Circuit, relying on *Little League,* applied a selectivity analysis to determine whether Kiwanis Ridgewood was a public accommodation and, therefore, not "distinctly private." *Id.* at 476-77. The court found that the local club was selective based on its membership practices, which were described as follows:

The Ridgewood club is small, comprised of only twenty-eight members. Ten individuals have been members for over twenty years. Indeed, Kiwanis Ridgewood has admitted no more than twenty members over the course of the pa ecade. Each new member had to be sponsored by a current member, and formally voted in by the Ridgewood Board of Directors. The sponsorship of the existing member acted as a primary screening mechanism in the maintenance of the quality of membership. In addition to national membership requirements, Kiwanis Ridgewood established several local membership requirements, which included, among others, the candidate's willingness to pray at meetings and to recite the pledge of allegiance.

> Although Kiwanis International has encouraged large-scale membership solicitation in the past, the suggested "membership roundup" mailings were sent only to those prospects already known by current members. These individuals would be invited to a Kiwanis meeting to determine their compatibility with the organization's goals and members. The scope of these membership drives was limited. Not only did every solicited individual have to be known by an existing member, but every applicant out of that group of solicited individuals would have to be sponsored by an existing member.

[*Id.* at 475.]

Unlike Kiwanis Ridgewood, which used "sponsorship [by an] existing member . . . as a primary screening mechanism in the maintenance of . . . quality membership," Boy Scouts does not require new members "to be sponsored by a current member." *Ibid.* Nor does Boy Scouts limit its recruiting, or invitations to the public,

to individuals who are "known by an existing member." To the contrary, Boy Scout publications indicate that the organization seeks a broad membership base. In a booklet, entitled *A Representative Membership*,[8] Boy Scouts states that its "national objective, as well as for regions, areas, councils, and districts is to see that *all* eligible youth have the opportunity to *affiliate* with the Boy Scouts of America." *Id.* at 1 (emphasis added). The booklet is emphatically inclusive:

> We have high hopes for our nation's future. These hopes cannot flower if *any* part of our citizenry feels deprived of the opportunity to help shape the future. How can you persuade other Scouters to accept a commitment to a representative membership? Consider these facts:
>
> 1. Our federal charter sets forth our obligation to serve boys. Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of *any* boy. The National Council and Executive Board have always taken the position that Scouting should be available for *all* boys who meet the entrance age requirements.
>
> . . . .
>
> 4. Another aim of Scouting is the development of leadership. Leadership in America is needed in all sections of the country and in all economic, cultural, and ethnic groups.
>
> 5. To meet these responsibilities we have made a commitment that our membership shall be repre-

---

[8] Boy Scouts also questions whether this booklet is properly before us. *See supra* at —— n.— (slip op. at 35 n.6). The booklet on its face states that it is a BSA publication prepared for national, council, district, and local board/committee members, and Boy Scouts has not indicated otherwise.

sentative of *all* the population in every community, district, and council.

[*Id.* at 2 (emphasis added).]

Boy Scouts' large membership further undercuts its claim to selective membership. Nationally, over four million boys and one million adults were Boy Scout members in 1992.[9] Since its inception, over 87 million people have joined Boy Scouts. In 1991, Monmouth Council alone had over 8400 youths and over 2700 adult members. The New York Court of Appeals, construing "distinctly private" in *United States Power Squadrons v. State Human Rights Appeal Board*, has suggested that an organization's failure to limit its maximum membership, in and of itself, demonstrates that the club is not private: "Organizations which routinely accept applicants and place no subjective limits on the number of persons eligible for membership are not private clubs." 452 *N.E.*2d at 1204. We note only that the size of the Boy Scout organization certainly implies an open membership policy.

Boy Scouts argues, however, that it is "distinctly private" because its Scout Oath and Scout Law constitute genuine selectivity criteria. In support of its position, Boy Scouts relies in *Welsh v. Boy Scouts of America*, wherein the Seventh Circuit stated:

---

[9] Boy Scouts argues that this Court should follow *Kiwanis*, *supra*, 806 *F.*2d at 476 n.14, and limit review of Boy Scouts' membership selection practices to the local, rather than the national level. We decline to follow *Kiwanis* in this case. Boy Scouts' local units, unlike Kiwanis Ridgewood, are not authorized to establish additional "local membership requirements," *id.* at 475, nor are they empowered generally to change BSA's policies. We find that the various levels of scouting are interrelated such that a review of the national organization's membership selection practices—as opposed to the local unit—is most appropriate.

Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the Boy Scouts' Oath and Scout Law.

. . . We hold therefore that the Scouts organization not only is selective, but that its very Constitution, By-laws and doctrine dictate that it remain selective.

[993 *F.*2d at 1276-77.]

We acknowledge that Boy Scouts' membership application requires members to comply with the Scout Oath and Law. We do not find, however, that the Oath and Law operate as genuine selectivity criteria. To the contrary, the record discloses few instances in which the Oath and Law have been used to exclude a prospective member; in practice, they present no real impediment to joining Boy Scouts. Joining requirements are insufficient to establish selectivity where they do not function as true limits on the admission of members. *See Power Squadrons, supra*, 452 *N.E.*2d at 1204 (requiring examination for basic boating course was not "selective" where club "place[d] no subjective limits on the number of persons eligible for membership"). Here, there is no evidence that Boy Scouts does anything but accept at face value a scout's affirmation of the Oath and Law. *See Roberts v. United States Jaycees*, 468 *US.* 609, 621, 104 *S. Ct.* 3244, 3251, 82 *L. Ed.* 2d 462, 473 (1984) (finding group unselective where "new members are routinely recruited and admitted with no inquiry into their backgrounds").

Most important, it is clear that Boy Scouts does not limit its membership to individuals who belong to a par-

ticular religion or subscribe to a specific set of moral beliefs. Boy Scouts asserts that "[t]here is a close association between the Boy Scouts of America and virtually all religious bodies and denominations in the United States," and that each member's concept of "moral fitness" should be determined by his "courage to do what his head and heart tell him is right." *See supra* at —— (slip op. at 11-12). Moreover, Boy Scouts encourages its members to "respect and defend the rights of others whose beliefs may differ." *Scoutmaster Handbook, supra,* at 561. By its own teachings then, Boy Scouts is inclusive, not selective, in its membership practices.

Boy Scouts also argues that it is "distinctly private" because it is selective in its adult membership. In addition to the Scout Oath and Law requirements, adult members are bound by the Declaration of Religious Principle, and are subject to evaluation according to informal criteria designed to select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values. Several of the Troop 73 leaders who were involved in Dale's adult membership approval have said that they would not have approved Dale's application had they known that Dale was an "avowed" homosexual, thus lending support to BSA's position.

The Appellate Division's analysis of Boy Scouts' adult membership selectivity dispels the notion that an open membership organization can claim the "distinctly private" exception because it is selective as to a small subset of the larger group:

> We reject the suggestion that the BSA organization as a whole is not a place of public accommodation because more stringent membership criteria are applied to a single component of the organization,

> its adult members. Such a result is clearly inconsistent with the remedial purposes of the LAD. Acceptance of the argument would mean that public clubs in *Clover Hill* and *Fraser*, are not places of public accommodation because their member-counselors or lifeguards are subject to more stringent, enhanced training criteria. An extension of defendants' argument would be that the BSA is not a place of public accommodation because of the demanding standards that must be met to become an Eagle Scout.

[*Dale, supra,* 308 *N.J.* at 538 (citations omitted).]

See also Brounstein, supra, 839 *F. Supp.* at 1107-08 (stating that "[t]he fact that an organization is selective with respect to the privileges and benefits it accords to members does not exempt that organization from the proscriptions of the LAD if it is otherwise a 'public place of accommodation' ").

Boy Scouts accepts boys who come from diverse cultures and who belong to different religions. It teaches tolerance and understanding of differences in others. It presents itself to its members and to the public generally as a nonsectarian organization "available to all boys who meet the entrance age requirements". Its Charter and its Bylaws do not permit the exclusion of any boy. Boy Scouts is not "distinctly private" because it is not selective in its membership.

Boy Scouts claims, however, that it is exempt from the LAD because it is an "educational facility operated or maintained by a bona fide religious or sectarian institution." *N.J.S.A.* 10:5-51. This claim deserves little discussion. Boy Scouts repeatedly states that it is nonsectarian. Its Bylaws declare that no member shall be required "to take part in or observe a religious ceremony

distinctly unique" to a church or other religious organization. Boy Scouts emphasizes that religious instruction is better reserved for "the home and the organization or group with which the member is connected." Further, the *Scoutmaster Handbook* instructs its leaders that scouting "is identified with no particular faith, encourages no particular affiliation, nor assumes functions of religious bodies." We cannot say that Boy Scouts is a "bona fide religious or sectarian institution" in the face of the organization's clear pronouncements on this subject.[10]

Finally, Boy Scouts argues that requiring it to admit Dale frustrates "the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control." *N.J.S.A.* 10:5-51. The right of a parent to provide for the custody, care, and nurturing of a child is well-established. *Ginsberg v. New York*, 390 *U.S.* 629, 639, 88 *S. Ct.* 1274, 1280, 20 *L. Ed.* 2d 195, 203 (1968). In limited cases, that right is also extended to persons, like a stepparent, whose intent it is "to assume the parental relationship." *A.S. v. B.S.*, 139 *N.J. Super.* 366, 369 (Ch. Div. 1969). Boy Scouts does not qualify as "one in loco parentis."

Our prior decisions indicate that the status of *in loco parentis* is reserved for individuals who function as a parent. *See, e.g., Miller v. Miller*, 97 *N.J.* 154, 162 (1984) (recognizing stepparent may have *in loco parentis* relationship); *In re M.S.*, 72 *N.J.* 238, 243-44 (1977) (finding juvenile shelter for delinquents stands *in loco parentis*). Characteristics of that relationship include "the

---

10 That Boy Scouts' oath expresses a belief in God does not make it a religious institution. Nor does Boy Scouts' commitment to "[e]*ducation* and fun," *see supra* at —— (slip op. at 42) (emphasis added), qualify it as an "educational facility" under *N.J.S.A.* 10:5-51.

responsibility to maintain, rear and educate the child," *Miller, supra*, 97 *N.J.* at 162, as well as the duties of "supervision, care and rehabilitation," *In re M.S., supra*, 72 *N.J.* at 242; *see also A.S., supra*, 139 *N.J. Super.* at 369 (defining role as "one who means to put himself in the situation of the lawful father with reference to the father's office and duty of making provision for the child"). Boy Scouts does not assume those responsibilities or those duties. It does not maintain or rear children. A Boy Scout leader may function as a supervisor of children for limited periods of time; he does not have "the responsibility to maintain, rear and educate" children such that he stands in the place of a parent.

We hold that Boy Scouts is a "place of public accommodation" and is not exempt from the LAD under any of the statute's exceptions.

3. *Have Boy Scouts Violated the LAD?*

N.J.S.A. 10:5-4 states that "[a]ll persons shall have the opportunity to obtain . . . all the accommodations, advantages, facilities, and privileges of any place of public accommodation." Because we hold that an assistant scoutmaster position is a "privilege" and an "advantage" of Boy Scout membership, and because Boy Scouts has "revoked" Dale's registration based on his "avowed" homosexuality, a prohibited form of discrimination under the statute, we conclude that Boy Scouts has violated the LAD.

In Dale's revocation letter, Boy Scouts expressly stated that "BSA membership registration is a privilege." Boy Scouts has also taken the position that "adult membership" and "adult leadership" are "interchangeable" in the scouting world. *See supra* at —— (slip op. at 15). Boy Scouts' statements raise the question whether the organization has waived its right to challenge Dale's claim that

he has been denied a "privilege" within the meaning of the LAD.

We find, nonetheless, the Boy Scout membership is both a "privilege" and "advantage." The organization provides its members with numerous benefits, including opportunities to participate in group activities and to develop a variety of skills, *e.g.*, camping, cooking, first aid, lifesaving. Boy Scout leaders are given the "advantage" of numerous training courses that teach valuable lessons in leadership and management. Scouting indirectly benefits its members through the "advantage" of a large influential network, including Air Force Academy, Annapolis and West Point graduates, Rhodes Scholars, astronauts, United States Presidents and Congressmen, as well as businessmen and community leaders. Indeed, Boy Scouts advertises the "privileges" and "advantages" of being a member in order to attract new members.[11] *See id.* at —— (slip op. at 35). It is undeniable that Dale lost those "privileges" and "advantages" when he was expelled. It necessarily follows that Boy Scouts violated the LAD when it expelled him.

---

11 In *Quinnipiac Council Boy Scouts of America v. Commission on Human Rights and Opportunities*, 204 A.2d 352 (Conn. 1987), the Connecticut Supreme Court held that Boy Scouts had not denied a woman an "accommodation," which it interpreted to mean "access to goods and services," when it denied her the opportunity to serve as a scoutmaster. *Id.* at 360. The Connecticut public accommodation statute interpreted by the Connecticut Supreme Court is distinguishable from our New Jersey statute. The LAD is not concerned solely with the denial of an "accommodation" or "goods and services," but rather prohibits places of public accommodation from refusing to provide "accommodations, advantages, facilities [or] privileges." *N.J.S.A.* 10:5-4. While volunteer scoutmaster positions may not be "goods [or] services," they are a "privilege" and an "advantage."

B. *The Common Law*

Dale asserts that Boy Scouts is also prohibited from discriminating against him by the common law. The Legislature did not intend to abrogate all common law causes of action with the enactment of the LAD. *See N.J.S.A.* 10:5-27 ("Nothing herein contained shall bar, exclude or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful discrimination."); *see also N.J.S.A.* 10:5-3 ("The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed *in combination with other protections* available under the laws of this State.") (emphasis added). In *Shaner v. Horizon Bancorp.*, we recognized that "a plaintiff in appropriate circumstances could pursue an independent action . . . to vindicate particular interests in addition to or aside from those sought to be protected by a LAD action." 116 *N.J.* 433, 454 (1989).

In many cases, however, a common law claim is merely duplicative of a LAD claim and "it might be unnecessary to recognize or create . . . [an] action to vindicate substantially the same rights and provide similar relief." *Ibid.; accord Erickson v. Marsh & McLennan Co.*, 117 *N.J.* 539, 562 (1990). We find that Dale's common law claim, if pursued, would not protect an interest "in addition to or aside from those" protected by his statutory action. *Shaner, supra*, 116 *N.J.* at 454. Accordingly, we hold that Dale's common law claim is duplicative of his LAD claim.

IV

THE FIRST AMENDMENT

Our holding that New Jersey's Law Against Discrimination applies to Boy Scouts requires that we reach Boy Scouts' claim that its First Amendment rights are thereby violated. *See U.S. Const.* amend. I. Boy Scouts asserts the rights of its members "to enter into and maintain . . . intimate or private relationships. . . . [and] to associate for the purpose of engaging in protected speech." *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 *U.S.* 537, 544, 107 *S. Ct.* 1940, 1945, 95 *L. Ed.* 2d 474, 483-84 (1987).

The United States Supreme Court has referred to the constitutionally protected freedom of association in two distinct contexts. "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts, supra*, 468 *U.S.* at 617-18, 104 *S. Ct.* at 3249, 82 *L. Ed.* 2d at 471. Those cases are typically referred to as "intimate association" cases. "In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618, 104 *S. Ct.* at 3249, 82 *L. Ed.* 2d at 471. Those cases have been described as "expressive association" cases.

Boy Scouts' First Amendment claim requires that we examine the analytical framework within which the United States Supreme Court has discussed this complex of associational rights.

A. *Freedom of Intimate Association*

"[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618, 104 *S. Ct.* at 3250, 82 *L. Ed.* 2d at 471. The freedom to maintain personal relationships or to engage in intimate associations is thus "a fundamental element of liberty protected by the Bill of Rights." *Rotary Club, supra*, 481 *U.S.* at 545, 107 *S. Ct.* at 1945, 95 *L. Ed.* 2d at 484. Although the Supreme Court has never set the "precise boundaries" of this freedom, "[t]he intimate relationships to which [it] has accorded constitutional protection include marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." *Id.* at 545, 107 *S. Ct.* at 1945-46, 95 *L. Ed.* 2d at 484 (citations omitted). The freedom of intimate association, however, is not restricted to family relationships; rather, the Court has "emphasized that the First Amendment protects those relationships . . . that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.'" *Id.* at 545, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 484 (quoting *Roberts, supra*, 468 *U.S.* at 619-20, 104 *S. Ct.* at 3250, 82 *L. Ed.* 2d at 472).

Two seminal cases have considered the claims of national membership organizations that the intimate association rights of their members had been abridged by the application of state laws similar to the LAD. In *Roberts v. United States Jaycees*, the Jaycees brought an action contending that application of Minnesota's public accommodations law requiring the organization to admit women

as regular members violated the male members' intimate association rights. Under the Jaycees' Bylaws, men between the ages of eighteen and thirty-five were eligible for regular membership, whereas only "associate membership" was available to women. *Roberts, supra,* 468 *U.S.* at 613, 104 *S. Ct.* at 3248, 82 *L. Ed.* 2d at 468. Unlike regular members, associate members could not vote, hold office, or "participate in certain leadership training and awards programs." *Ibid.* Nonetheless, as associate members, women "attend[ed] various meetings, participate[d] in selected projects, and engage[d] in many of the organization's social functions." *Id.* at 621, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 473.

Based on those facts, the Supreme Court concluded that "the Jaycees chapters lack[ed] the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women." *Id.* at 621, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 474. Specifically, the Court emphasized that "the local chapters of the Jaycees are neither small nor selective," and that "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship." *Ibid.* At the time of trial, the local chapters involved in the suit had approximately 400 members, *id.* at 621, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 473, and the organization had 295,000 members nationwide, *id.* at 613, 104 *S. Ct.* at 3246, 82 *L. Ed.* 2d at 468. Furthermore, "[a]part from age and sex, neither the national organization nor the local chapters employ[ed] any criteria for judging applicants for membership." *Ibid.*

In *Board of Directors of Rotary International v. Rotary Club of Duarte,* the Court again considered a First Amendment challenge to a state antidiscrimination statute requiring a national membership organization to admit

women. There, the charter of a local chapter of Rotary International was revoked by the national organization because it admitted women members. *Rotary Club, supra,* 481 *U.S.* at 541, 107 *S. Ct.* at 1943, 95 *L. Ed.* 2d at 482. Under the Rotary constitution, women were excluded from membership, although "women [were] permitted to attend meetings, give speeches, and receive awards." *Id.* at 541, 107 *S. Ct.* at 1943, 95 *L. Ed.* 2d at 481. The local chapter and two of its female members brought an action challenging the national organization's exclusionary policy under the California civil rights statute. *Id.* at 541, 107 *S. Ct.* at 1943, 95 *L. Ed.* 2d at 482. Rotary International argued that requiring it to admit women would infringe on its right of intimate association.

Once again the Court concluded that "the relationship among [the organization's] members is not the kind of intimate or private relation that warrants constitutional protection." *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 484-85. The Court noted that local chapters ranged in size from "fewer than 20 [members] to more than 900," and that the national organization did not set an "upper limit on the membership of any local Rotary Club." *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485. The Court also emphasized Rotary International's inclusive membership policy, pointing to the organization's own declaration that "[t]he purpose of Rotary 'is to produce an inclusive, not exclusive, membership.' " *Ibid.* In order to fulfill this purpose, "[t]he clubs . . . [were] instructed to 'keep a flow of prospects coming' to make up for . . . attrition and gradually to enlarge membership." *Ibid.* Most important, Rotary International's membership policy was designed to " 'enabl[e] the club to be a true cross section of the business and professional life of the community.' " *Ibid.* On these facts, the Court concluded that "[s]uch an inclusive 'fellowship for service based on

diversity of interest,' . . . does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment." *Id.* at 546-47, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485.

Those cases teach us to consider, among other things, "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship," when we examine membership organizations to determine whether a protectable intimate association right is present. *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485; *see also Roberts, supra,* 468 *U.S.* at 620, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 473 (stating that "factors . . . relevant [to an intimate association analysis] include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent"). As applied to Boy Scouts, we find that its large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not "sufficiently personal or private to warrant constitutional protection" under the freedom of intimate association.

As a preliminary matter, contrary to Boy Scouts' assertion, whether we evaluate the Boy Scout organization at the national or local troop level, the result would be the same. *See supra* at —— (slip op. at 48 n.9). Either way, Boy Scouts cannot claim the right of intimate association for its members. Because Boy Scouts' argument is necessarily stronger at the smaller troop level, we will consider the intimate association factors as applied to local troops.

Boy Scouts informs us that a typical Boy Scout troop consists of between fifteen and thirty boys and several adult leaders. In *Rotary Club*, the Supreme Court specifically held that a local club with as few as twenty members did not qualify as "the kind of intimate or private relation that warrants constitutional protection." 481 *U.S.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 484-85. Moreover, Boy Scout troops are unselective in their membership. *See supra* at —— (slip op. at 49-53). Any boy between the ages of eleven and seventeen can join; indeed, Boy Scouts has quite clearly said that "any boy" is welcome. *See id.* at —— (slip op. at 52). Boy Scouts also has not set an upper limit on the number of boys who can join, but instead, actively seeks to interest as many boys as possible through advertising and other outreach methods. *See id.* at —— (slip op. at 35-36). Even if Boy Scouts is more selective in choosing its leaders, leaders do not substitute for the boys' parents, *see id.* at —— (slip op. at 55); nor do they have private or intimate relationships with troop members. Relationships within the troop are simply not the "kind of . . . personal relationship[s] to which [the Supreme Court has] accorded protection under the First Amendment." *Rotary Club, supra,* 481 *U.S.* at 547, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485.

Boy Scouts' inclusive purpose deserves further discussion in this context. Like the Rotary Clubs analyzed by the Supreme Court, the purpose of Boy Scouts "is to produce inclusive, not exclusive membership." *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485. Boy Scouts has made a commitment to ensure that its membership is "representative of all of the population." *See supra* at —— (slip op. at 48). "Such an inclusive fellowship . . . based on diversity of interest, however beneficial to the members" is also not indicative of a protectable form of intimate association. *Rotary Club, supra,* 481 *U.S.* at 546-47, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485.

Boy Scouts' practice of inviting or allowing nonmembers to attend certain troop meetings further persuades us that

Boy Scouts cannot claim the right of intimate association. In *Rotary Club*, the Supreme Court observed that "[m]any of the Rotary Clubs' central activities [were] carried on in the presence of strangers. . . . [and that] clubs [were] encouraged to seek coverage of their meetings and activities in local newspapers." *Id.* at 547, 107 *S. Ct.* at 1946-47, 95 *L. Ed.* 2d at 485. In the Court's view, this negated Rotary International's claim that the California Civil Rights Act "interfere[d] unduly with the members' freedom of private association." *Id.* at 547, 107 *S. Ct.* at 1947, 95 *L. Ed.* 2d at 485. Likewise, Boy Scouts' practice of inviting nonmembers to "School Nights" and other similar activities undermines its intimate association claim. *See supra* at —— (slip op. at 5).

We conclude that Boy Scouts has not demonstrated a protectable intimate association right under the First Amendment.

B. *Freedom of Expressive Association*

"An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts, supra,* 468 *U.S.* at 622, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474. Thus, "the right to engage in activities protected by the First Amendment [carries with it] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Ibid.* The freedom to come together in furtherance of a "collective" purpose provides protection for minority views, thereby fostering "political and cultural diversity." *Ibid.*

When the government attempts "to interfere with the internal organization or affairs of the group," *id.* at 623,

104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474, the members' freedom of expressive association may be curtailed. In this regard, the Supreme Court has said that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* at 623, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474-75. This does not mean, however, "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Ass'n v. City of New York,* 487 *U.S.* 1, 13, 108 *S. Ct.* 2225, 2234, 101 *L. Ed.* 2d 1, 16 (1988). Rather, the Court has found that a group member infringes upon an organization's freedom of expressive association only if he or she "affect[s] 'in any significant way' the [other members'] ability . . . to . . . advocate public or private viewpoints." *Ibid.; see also Rotary Club, supra,* 481 *U.S.* at 548, 107 *S.Ct.* at 1947, 95 *L. Ed.* 2d at 486 (holding that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes"); *Roberts, supra,* 468 *U.S.* at 626-27, 104 *S. Ct.* at 3254, 82 *L. Ed.* 2d at 477 (ruling that "the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association" because "[t]here is . . . no basis in the record for concluding that admission of women . . . will impede the organization's ability to engage in these protected activities or to disseminate its preferred views").

Moreover, "[t]he right to associate for expressive purposes is not . . . absolute." *Roberts, supra,* 468 *U.S.* at 623, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 475. The Supreme Court has held that "[i]nfringements on that right may be justified by regulations adopted to serve compel-

ling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom." *Ibid.* State laws against discrimination may take precedence over the right of expressive association because "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Id.* at 628, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478. The right of expressive association must, therefore, be weighed against this compelling interest in each case.

We find that the LAD does not violate Boy Scouts' freedom of expressive association because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views. The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scouts members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

Boy Scouts claims that its members' views regarding homosexuality are evident from its Scout Law and Oath, which embody general moral principles. The Scout Law requires Boy Scout members to be "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent," whereas the Oath requires each scout to promise: "I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." Boy Scouts asserts that it teaches those moral principles to its members through scouting activities. BSA Bylaws require

that "in all activities, emphasis [is to] be placed upon practice in daily life of the principles of the Scout Oath." Boy Scouts aims to foster "strength, confidence, and good judgment" by providing boys with "a world full of exciting adventures" and the opportunity "to go places and do things." *Boy Scout Handbook, supra,* at vii. In the words of the Chief Scout Executive:

> As a Scout, you'll hike and camp, learn how to live in the out-of-doors, and discover many ways to care for the land. You can cook your meals over a camp stove and identify all kinds of plants and animals that are part of our environment. No matter what happens, you'll know how to take care of yourself. You'll develop strength, confidence, and good judgment. And you can find out how it feels to be a leader.

[*Ibid.*]

We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members. *Cf. Roberts, supra,* 468 *U.S.* at 636, 104 *S. Ct.* at 3259-60, 82 *L. Ed.* 2d at 483-84, (O'Connor, J., concurring in part and concurring in judgment) (stating "protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. . . . [and e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement"). We are not persuaded, however, that a "shared goal[]" of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral. *See id.* at 622, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474 (recognizing that freedom of expressive association pro-

tects an association's "collective effort on behalf of shared goals").

Boy Scouts argues that the words "morally straight" and "clean" in the Scout Oath and Law explicitly or implicitly stand for the proposition that homosexuality is immoral.[12] In support of its position, Boy Scouts relies on the *Boy Scout Handbook* definition of "morally straight" and "clean"

Morally Straight

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Clean

> A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.
>
> You never need to be ashamed of dirt that will wash off. . . .

---

12 Boy Scouts also points to a 1978 position paper in support of its argument that it associates for the expressive purpose of advocating the immorality of homosexuality. *See supra* at — (slip op. at 17 n.4). We observe that the position paper was not disseminated to Boy Scout members, and decline, therefore, to view it as representative of the members' shared views.

In addition, Boy Scouts refers to four other position papers, all written after Dale's expulsion. The self-serving nature of these papers is apparent.

> There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> Swear words, profanity and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are the targets of insults.

The words "morally straight" and "clean" do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral. We doubt that young boys would ascribe any meaning to these terms other than a commitment to be good.

Boy Scouts also argues that the immorality of homosexuality can be implied from the moral principles expressed by the Scout Oath and Law. Yet, Boy Scouts teaches that "moral fitness" is an individual choice and defers the ultimate definition to its members:

> Morality . . . concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by *our* conscience or ethical judgment." . . .
>
> In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what *his* head and *his* heart tell him is right. And the courage to refuse to do what *his* heart and *his* head say is wrong.

[*Scoutmaster Handbook*, *supra*, at 71 (emphasis added).]

The *Boy Scout Handbook*, *supra* at 551, also acknowledges that a member's concept of morality is intertwined with his "religious beliefs." The record in this case reveals

that Boy Scouts' religious sponsors differ in their views about homosexuality.[13] *Compare* Brief of *Amici Curiae* National Catholic Committee on Scouting et al. at 1 (declaring that Boy Scouts' admission of practicing homosexuals would affect some church sponsors' ability "to advance core moral values, arising from sincere well established religious beliefs") *with* Brief of *Amici Curiae* The Diocesan Council of the Episcopal Diocese of Newark, et al. at 1 (stating that "the teachings of the Episcopal Church . . . affirm[] the rights of lesbians and gay men to the equal protection of the laws and to live free from discrimination based upon affectional or sexual orientation"). On the record before us, it appears that no single view on this subject functions as a unifying associational goal of the organization.

We hold, therefore, that Dale's membership does not violate Boy Scouts' right to expressive association because his inclusion would not "affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes." *Rotary Club, supra*, 481 *U.S.* at 548, 107 *S. Ct.* at 1947, 95 *L. Ed.* 2d at 486.

That Boy Scout members do not associate to share the view that homosexuality is immoral suggests that Dale's expulsion constituted discrimination based solely on his status as an openly gay man. The United States Supreme Court has not hesitated to uphold the enforcement of a state's antidiscrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members' shared expressive purpose. *See Robert, supra*, 468 *U.S.* at 628, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478 ("[W]e decline to indulge in the sexual stereotyping that underlies appellee's

[13] We note in passing that Boy Scouts has renewed the charters of sponsors whose positions differ from that alleged by Boy Scouts.

contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech."); *see also New York State Club Ass'n, supra*, 487 *U.S.* at 13, 108 *S. Ct.* at 2234, 101 *L. Ed.* 2d at 16 (upholding antidiscrimination law that "merely prevents an association from using . . . specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership").

Boy Scouts submits that it expelled Dale because he "was pictured and written-up in the *Star-Ledger* as Co-President of the Rutgers University and Gay Alliance." *See supra* at — (slip op. at 17). In the article, Dale states that he is gay. He does not identify himself as a Boy Scout leader or member, nor does he express an opinion about any of Boy Scouts' policies, or suggest that Boy Scouts should allow him openly to advocate acceptance of homosexuality.[14] Indeed, Dale has stated that he accepts and endorses Boy Scouts' moral principles. In Dale's words:

> Scouting appealed to me for many reasons. . . . I admired the purposes for which BSA stands—teaching young people outdoor and camping skills, developing their leadership abilities and sense of community responsibility, and providing them with the tools to make moral choices over the course of their lives.

[14] Boy Scouts argues that Dale's recent public statements about the policy of excluding avowed homosexuals indicate that he has a "moral viewpoint in opposition to that of Boy Scouts and [has] expressed that viewpoint to all who will listen." We have no evidence, however, that when Dale refers to this "policy," he is talking about anything other than the decision to expel him because of his status as co-president of the Rutgers University Lesbian/Gay Alliance.

As a Scout, I promised to live by the Scout Oath. . . . I believed that the Scout Oath stood for my commitment to live an honorable life, to set high standards for myself, and to do my best to serve others. In my more than twelve years as a member of BSA, I strove never to do anything inconsistent with the values embodied in the Scout Oath. . . .

. . . I understood the Scout Oath to represent the high ideals Scouting encouraged each of its members to achieve. In all my years in Scouting, I always tried to live in accordance with the Scout Law and to adhere to the values embodied in it.

As I grew . . . older, my commitment to Scouting deepened. Scouting . . . taught me how to deal with the ethical choices I encountered as a teenager.

Nonetheless, despite Dale's commitment, he was expelled from Boy Scouts shortly after the article was published.

The original termination letter Dale received indicates that Dale was expelled because of his status and not because his membership conflicted with Boy Scouts' message. In it, Boy Scouts told Dale he was being terminated because of his sexual orientation: "The grounds for this membership revocation are the standards for leadership established by Boy Scouts of America, which specifically forbid membership to homosexuals." In subsequent letters, Boy Scouts attempted to connect Dale's termination with his "avowed" homosexuality and Boy Scouts' "policy [to] exclud[e] adults whose views of the morality of homosexual conduct differ from the views held by Boy Scouts of America." Those subsequent letters suggest that Boy Scouts perceived Dale's membership as interfering with its views on "the morality of homosexual conduct"; they do not alter Boy Scouts' original statement. The original

termination letter expresses Boy Scouts' real concern: Dale's status as a homosexual.

Perhaps more revealing is the contradiction between Boy Scouts' current litigation posture on homosexual members and the organization's general philosophy on open membership. Boy Scouts has been firmly committed to a diverse and "representative" membership. It recognizes that the skills it teaches its members are needed "in all economic, cultural, and ethnic groups." *A Representative Membership, supra,* at 2. Its objective is to see to it "that all eligible youth have the opportunity to affiliate with the Boy Scouts of America." *Id.* at 1. As we observed earlier, consistent with this position, Boy Scouts does not seek to limit membership to individuals of a particular religious faith or moral persuasion. *See supra* at — (slip op. at 11, 12, 50). The result of this "all-inclusive" membership policy is the admission of four million boys and over one million adults. *See id.* at — (slip op. at 48).

When contrasted with its "all-inclusive" policy, Boy Scouts' litigation stance on homosexuality appears antithetical to the organization's goals and philosophy. The exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and "representative" membership. Moreover, this exclusionary practice contradicts Boy Scouts' overarching objective to reach "all eligible youth." We are satisfied that Boy Scouts' expulsion of Dale is based on little more than prejudice and not on a unified Boy Scout position; in other words, Dale's expulsion is not justified by the need to preserve the organization's expressive rights.

The invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men,

women, and children who belong to excluded groups. By way of example, we observe that certain claimed propensities of character were once invoked to advocate the subjugation of women. *United States v. Virginia* recites the prevailing view of women at the time of the writing of the Constitution: " 'Were our State a pure democracy . . . there would yet be excluded from [our] deliberations . . . women, who, to prevent depravation of morals and ambiguity of issue, should not mix promiscuously in the public meetings of men.' " 518 *U.S.* 515, 531 n.5, 116 *S. Ct.* 2264, 2275 n.5, 135 *L. Ed.* 2d 735, 750 n.5 (1996) (quoting Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816)). Less than a century later, the exclusion of women from the Illinois State Bar was thought to be justified because

> [t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. The harmony, not to say identity, of interests and views which belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

[*Bradwell v. Illinois*, 83 *U.S.* (16 *Wall.*) 130, 141, 21 *L. Ed.* 442, 446 (1873) (Bradley, J., concurring).]

See also J.E.B. v. Alabama, 511 *U.S.* 127, 132, 114 *S. Ct.* 1419, 1423, 128 *L. Ed.* 2d 89, 99 (1994) (noting that women were traditionally kept from jury duty because they "were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere").

The sad truth is that excluded groups and individuals have been prevented from full participation in the social, economic, and political life of our country.[15] The human price of this bigotry has been enormous. At a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination.

New Jersey has long been a leader in this effort. *See, e.g., Peper, supra*, 77 *N.J.* at 80 (stating that "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society"). In 1945, the New Jersey Legislature codified its commitment to equality by enacting the LAD, "some twenty years before the effective date of Title VII." *Ibid.*; *see* 42 *U.S.C.A.* §§ 2000a-2000h-6. The Legislature found that "because of discrimination, people suffer personal hardships, and the State suffers a grievous harm." *N.J.S.A.* 10:5-3. In specific, the Legislature determined that victims of discrimination suffer

> economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems.

[*Ibid.*]

---

[15] The LAD prohibits discrimination on the basis of "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex. . . ." *N.J.S.A.* 10:5-4. The scope of the statute is reflective of the breadth of the underlying problems we face as a society.

It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society.

In 1991, the Legislature amended the LAD, *L.* 1991, *c.* 519, § 2, to add "affectional or sexual orientation" to the list of protected classes. This amendment extends New Jersey's historical commitment to the eradication of discrimination to that group of individuals who face discrimination because of sexual orientation. As the Appellate Division stated:

> By amendment to *N.J.S.A.* 10:5-4 in 1991 (*L.* 1991, *c.* 519, § 2), the Legislature expanded the categories of persons protected to include discrimination based on "affectional or sexual orientation." This was an implicit recognition that discrimination based on "archaic" and "stereotypical notions" about homosexuals that bears no relationship to reality cannot be countenanced. *Roberts, supra,* 468 *U.S.* at 625, 104 *S. Ct.* at 3253, 82 *L. Ed.* 2d at 476. It is also a recognition that the "stigmatizing injury" and denial of equal opportunities that accompanies it is felt no less strongly by this protected group than others who suffer personal hardship because of discriminatory practice. *Ibid.*

[*Dale, supra,* 308 *N.J. Super.* at 549.]

With the amendment of the LAD, the Legislature declared that discrimination in places of public accommodation on the basis of "affectional or sexual orientation . . . [is] a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." *N.J.S.A.* 10:5-3. Our courts have

recognized the arbitrariness of discriminating against individuals solely because of their sexual orientation. *See, e.g., One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control,* 50 *N.J.* 329, 340-41 (1967) (rejecting argument that permitting "apparent homosexuals" to congregate at bar threatens public welfare); *Poff, supra,* 228 *N.J. Super.* at 381 (stating that "refus[al] to extend . . . [LAD's] protection to homosexuals because they may be more susceptible to a dread disease would mark a return to a past of judging individuals on the basis of ignorance and prejudice"); *In re J.S. & C.,* 129 *N.J. Super.* 486, 489 (Ch. Div. 1974) (stating that "[f]undamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation, *per se*"), *aff'd,* 142 *N.J. Super.* 499 (App. Div. 1976).

A purpose of the LAD is to eliminate sexual orientation discrimination. The statute effectuates this purpose without regard to an organization's viewpoint, "the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley, supra,* 515 *U.S.* at 572, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503 (recognizing that such laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination"); *see also Rotary Club, supra,* 481 *U.S.* at 549, 107 *S. Ct.* at 1948, 95 *L. Ed.* 2d at 487 (upholding Minnesota public accommodations law that made "no distinctions on the basis of the organization's viewpoint"). Like other similar statutes, the LAD serves a compelling state interest and "abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts, supra,* 468 *U.S.* at 629, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478. Thus, even if Dale's membership " 'work[s] some

slight infringement on . . . [Boy Scouts'] members' right of expressive association," we find that the "infringement is justified because it serves . . . [New Jersey's] compelling interest in eliminating discrimination" based on sexual orientation. *Rotary Club, supra,* 481 U.S. at 549, 107 *S. Ct.* at 1948, 95 *L. Ed.* 2d at 486.

Boy Scouts is an American institution committed to bringing a diverse group of young boys and men together —wealthy and underprivileged, urban and rural, from different cultures and from different religions—to play and to learn. Boy Scouts' activities are designed to build character and instill moral principles. Nothing before us, however, suggests that one of Boy Scouts' purposes is to promote the view that homosexuality is immoral. Accordingly, application of the LAD does not infringe upon Boy Scouts' right of expressive association.

C. *Freedom of Speech*

Boy Scouts relies on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* in support of its alleged First Amendment right to exclude Dale. In *Hurley*, GLIB, an organization comprised of gay, lesbian, and bisexual descendants of Irish immigrants, applied for permission to march in the St. Patrick's Day-Evacuation Day Parade. 515 *U.S.* at 561, 115 *S. Ct.* at 2341, 132 *L. Ed.* 2d at 496. GLIB was formed for the sole purpose of marching in the parade, "to express pride in [the members'] Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express . . . solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade." *Ibid.* The private parade organizers, the South Boston Allied War Veterans Council, refused to allow GLIB to march, and

the group brought suit alleging that the Council's actions violated the state's public accommodations law. *Ibid.*

The *Hurley* Court held that inclusion of the group in the parade would violate the Council's First Amendment rights. The Court observed that the state public accommodations statute had "been applied in a peculiar way," because "[i]ts enforcement [did] not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade . . . . [but rather] the admission of GLIB as its own parade unit carrying its own banner." *Id.* at 572, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503. The Court explained that forcing the Council to include GLIB would "essentially requir[e] [the members] to alter the expressive content of their parade," *id.* at 572-73, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503, because "in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole," *id.* at 577, 115 *S. Ct.* at 2349, 132 *L. Ed.* 2d at 506. Application of the statute in that context was held to "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503. Indeed, application of the statute "had the effect of declaring the sponsors' speech itself to be the public accommodation." *Ibid.*

We find the facts of *Hurley* distinguishable. Dale's status as a scout leader is not equivalent to a group marching in a parade. Dale does not come to Boy Scout meetings "carrying a banner." Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' poli-

cies. *Cf. Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 *P.*2d 218, 253 (Cal. 1998) (Kennard, J., concurring) (proclaiming that Boys Scouts would have valid First Amendment defense if California's antidiscrimination law applied because Curran sought "membership in order to promote . . . [his] views"). Additionally, there is no indication that Dale intends to actively "teach" anything whatsoever about homosexuality as a scout leader, or that he will do other than Boy Scouts instructs him to do—refer boys to their parents on matters of religion and sex.

Nor is Boy Scout leadership a form of "pure speech" akin to a parade. As the *Hurley* Court explained, "the word 'parade' [is used] to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." 515 *U.S.* at 568, 115 *S. Ct.* at 2345, 132 *L. Ed.* 2d at 500. Unlike a marcher in a parade, Dale does not participate in Boy Scouts "to make a point" about sexuality, but rather because of his respect for and belief in the organization. And unlike a parade, where the "speech itself . . . [is] the public accommodation," *id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503, permitting Dale to remain in a leadership position in no way prevents Boy Scouts from "invok[ing] its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another," *id.* at 574, 115 *S. Ct.* at 2348, 132 *L. Ed.* 2d at 504. We reject the notion that Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality. On these facts, we do not find forced speech. *See id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503 (declaring that right to free speech includes right to "decide 'what not to say'") (*quoting Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 *U.S.* 1, 16, 106 *S. Ct.* 903, 912, 89 *L. Ed.* 2d 1, 12 (1986)).

In short, the reinstatement of Dale does not compel Boy Scouts to express any message. To recognize Boy Scouts' First Amendment claim would be tantamount to tolerating the expulsion of an individual solely because of his status as a homosexual—an act of discrimination unprotected by the First Amendment freedom of speech.

V

CONCLUSION

Today, we hold that Boy Scouts is a "place of public accommodation" and is, therefore, subject to the provisions of the LAD. As a "place of public accommodation" it cannot deny any person "accommodations, advantages, facilities, and privileges . . . because of . . . sexual orientation." *N.J.S.A.* 10:5-4. For the reasons set forth in this opinion, application of the LAD does not infringe on Boy Scouts' First Amendment rights.

The judgment of the Appellate Division is affirmed. We remand to the Chancery Division for further proceedings consistent with this opinion.

JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN, and COLEMAN join in CHIEF JUSTICE PORITZ's opinion. JUSTICE HANDLER has filed a separate concurring opinion.

HANDLER, J., concurring.

I join the Court in holding that the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49, prohibits the Boy Scouts of America (BSA) and the Monmouth Council of the Boy Scouts of America (collectively, Boy Scouts), as places of public accommodation, from expelling a member based solely on his sexual orientation. I fully endorse the Court's reasoning in reaching that result. I further emphasize, in the context of this case, the significance of the role of "genuine membership selectivity" as a material factor in the characterization of a place of accommodation as "public."

This case also pits an individual's right to be protected under the LAD from discrimination based on his sexual orientation against the First Amendment expressional rights of a public accommodation. In resolving that conflict, we must consider the significance of the connection between the individual's speech and his identity when both relate to his sexual orientation.

I

On July 19, 1990, soon after learning that highly decorated Eagle Scout James Dale was gay, Boy Scouts revoked Dale's membership privileges and requested that he sever all relations with the organization. After Dale inquired about the basis for his explusion, he was first informed that Boy Scouts "forbid[s] membership to homosexuals," and later that "[BSA] does not admit avowed homosexuals to membership in the organization," *Ante* at —— (slip op. at 17, 18). Dale thereafter commenced this lawsuit, charging Boy Scouts with violations of the LAD. Dale specifically contended that Boy Scouts, as a place of public accommodation, illegally expelled him based on his "affectional or sexual orientation," contrary to *N.J.S.A.* 10:5-4.

A.

The critical question in deciding whether Boy Scouts violated the LAD by terminating Dale's membership, as the Court recognizes, is whether Boy Scouts may be deemed a "place of public accommodation." *Ante* at —— (slip op. at 27). The Court observes that the term "place" in the LAD is not limited to a single geographic situs and, therefore, a fixed location is not a prerequisite to satisfying its definition. *Id.* at —— (slip op. at 32). A "place" encompasses any location or facility at which an organization undertakes its activities. Boy Scouts, the Court determines, as an organization that performs its functions at numerous locales, is clearly a "place" under the LAD. *Id.* at — (slip op. at 33). We also conclude that Boy Scouts is an "accommodation" for purposes of the LAD, especially given its uniquely educational and recreational nature. *Id.* at — (slip op. at 41-42). Further, Boy Scouts is sufficiently "public" to be covered by the LAD. *Id.* at — (slip op. at 36-37). If an organization either expressly or impliedly engages in broad public solicitation, it is considered "public" for purposes of the LAD. *Id.* at — (slip op. at 33-35). Because Boy Scouts extends general membership invitations through such media as national broadcast and print advertising, public service announcements, recruiting drives and materials, as well as through the unique symbol of the scout uniform, Boy Scouts qualifies as "public." *Id.* at — (slip op. at 35-36). In addition, Boy Scouts' close relationship with other established public accommodations lends it a "public" character. *Id.* at — (slip op. at 37-41). I fully agree that these characteristics are sufficient to justify the Court's conclusion that Boy Scouts meets the LAD's definition of "place of public accommodation."

B.

A closely related organizational characteristic, "genuine selectivity," also bears on the "place of public accommodation" analysis. The absence of any genuine criteria for membership selectivity reinforces the "public" nature of an organization.

Membership selectivity, as the Court stresses, is a critically important factor in determining whether an organization is "distinctly private" pursuant to *N.J.S.A.* 10:5-51, and therefore exempt from the LAD's proscriptions applicable to an entity that is otherwise a "place of public accommodation." *See ante* at — (slip op. at 44) (noting that "selectivity issue [is] the principal determinant of 'distinctly private' status"). Membership selectivity is equally relevant to whether an organization may be initially considered to be a "place of public accommodation." *See id.* at — (slip op. at 45) (recognizing that absence of membership selectivity "weigh[s] in the public accommodation calculus"). The reason for this confluence is that the "distinctly private" exception is the "other side of the 'public accommodation' coin." *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 *F.*2d 468, 476 (3d Cir. 1986), *reh'g denied*, 811 *F.*2d 247 (1987). Realistically, and in most contexts, one characteristic cannot exist without negating the other:

> [I]f an organization "is not a 'place of public accommodation' because of its selective membership practices, it must be private as that term is used in the statute." In contrast, if an organization qualifies as a "place of public accommodation" . . . the "private" club exception . . . does not apply.

[*Brounstein v. American Cat Fanciers Ass'n*, 839 *F. Supp.* 1100, 1106 (D.N.J. 1993) (citation omitted).]

Thus, the selectivity that we require to meet the LAD's "distinctly private" exception also bears on the initial determination of whether a place of accommodation should be characterized as "public." As the Third Circuit Court of Appeals has observed, "unselectivity, unrestrictedness, and open invitation" are critical determinants of whether an organization is a "place of public accommodation." *Kiwanis, supra*, 806 *F.*2d at 476.[1] Of these three, selectivity has been described as the "touchstone of the determination of whether a membership organization is a 'place of public accommodation'." *Brounstein, supra*, 839 *F. Supp.* at 1106.

The focus of that investigation—as the Court requires in the context of our "distinctly private" exception analysis, *ante* at — (slip op. at 49-50)—must be selectivity in practice, *i.e.*, "genuine selectivity." "The genuine selectivity of the membership process is the most important factor in ascertaining private club status." *United States v. Lansdowne Swim Club*, 713 *F. Supp.* 785, 797 (E.D. Pa. 1989), *aff'd*, 894 *F.*2d 83 (3d Cir. 1990); *accord United States v. Trustees of the Fraternal Order of Eagles*, 472 *F. Supp.* 1174, 1175-76 (E.D. Wisc. 1979) (observing that "most important factor" in determining whether club is private and thus not public accommodation sub-

---

1 The *Kiwanis* court correctly identified the relevance of "unselectivity, unrestrictedness and open invitation" to the identification of a "place of public accommodation." It overstated those factors, however, as comprising the "test" for satisfying that definition. *Kiwanis, supra*, 806 *F.*2d at 476. If an organization possesses those characteristics, it will certainly qualify as a "place of public accommodation." Nevertheless, the absence or mere partial satisfaction of one or more of those factors does not preclude a finding that an organization is a "place of public accommodation." *See infra* at —— (slip op. at 12-14); *Kiwanis, supra*, 811 *F.*2d 247 (Gibbons, J., dissenting from sur denial of rehearing) (criticizing *Kiwanis* for suggesting that all associations that are not completely open, unselective and unrestrictive are not "public").

ject to Civil Rights Act, is "process which the club actually uses in selecting its members"). The United States Supreme Court has recognized genuine selectivity as an integral characteristic of a private club. *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 *U.S.* 431, 438, 93 *S. Ct.* 1090, 1094, 35 *L. Ed.* 2d 403, 409-10 (1973). The absence of genuine selectivity in membership decisions constitutes persuasive evidence of the public nature of an organization.

1.

A number of features reflect a club's genuine selectivity in membership practices:

> [T]he substantiality of the membership fee; the numerical limit on club membership (apart from the capacity of the facilties); the membership's control over the selection of new members; the formality of the club's admission procedures; the standards or criteria for admission; and whether and how many [] applicants have been denied membership relative to the total number of [] applicants.

[*Lansdowne Swim Club, supra*, 713 *F. Supp.* at 797 (citations omitted).]

The hallmark of genuine selectivity is that the organization actually uses its stated selection criteria to limit its membership in accordance with those criteria.

The Court's holding that a showing of genuine selectivity is required to satisfy the "distinctly private" exception in the LAD, *ante* at — (slip op. at 49-50) (rejecting application of "distinctly private" exception to Boy Scouts because "w[e] do not find [] that the Oath and Law operate as genuine selectivity criteria"), is consistent with our existing LAD jurisprudence. In *Clover Hill Swimming Club v. Goldsboro*, 47 *N.J.* 25 (1966), both

a sign at a swimming club's entrance and the club's promotional literature referred to itself as a "private" facility. *Id.* at 34. The literature further stated that "all applications would be subject to approval by club officials." *Ibid.* The Court held that such "[s]elf-serving declarations by the owner of an accommodation are not determinative of its character." *Ibid.* The relevant inquiry was whether in practice the club had exercised any actual discretion in its selection of new members.

Other courts have likewise recognized that selectivity in practice is integral to the determination of whether an organization is private and thus exempt from antidiscrimination laws. For example, in *Lansdowne Swim Club, supra*, the Third Circuit relied on principles of genuine selectivity in assessing whether a swimming club, charged with racial discrimination, qualified as a private club, thus exempting it from Title II of the Civil Rights Act of 1964. 894 *F.*2d at 85-86. The court pointed out that although the club required an interview for membership, it was "not probing, having the sole purposes of describing the club and its membership procedures and verifying the names and ages of children in the applicant's family," and that the club undertook virtually no other investigation of an applicant's background. *Id.* at 86 n.4. The court reasoned that "formal membership requirements 'have little meaning when in fact the club does not follow a selective membership policy.'" *Id.* at 86 (quoting *Wright v. Salisbury Club, Ltd.*, 632 *F.*2d 309, 312 (4th Cir. 1980) (citing *Tillman, supra*, 410 U.S. at 438-39, 93 *S. Ct.* at 1094-95, 35 *L. Ed.* 2d at 409-10)). The court further noted that evidence of only a few instances of applicant rejections by the club was probative of a lack of genuine selectivity. *Ibid.*

In *Fraternal Order of Eagles, supra,* the defendant claimed private club status based on an elaborate set of requirements codified in its statutes:

> Those statutes . . . include[d] the following requirements: (1) "[e]very applicant for membership in any Local Aerie shall be recommended by two members of the Order"; (2) "[n]o person shall be eligible to be elected to membership in any Local Aerie unless such person is a male, is of good moral character, and believes in the existence of a Supreme Being, . . ."; (3) "[no] application for membership shall be considered if the applicant shall not reside within the jurisdiction of the Aerie to which such application is submitted"; (4) "[e]ach person desiring to become a member of an Aerie must properly fill out and sign an application . . .;" (5) "[a]ll applications for membership . . . shall be referred to the Investigating Committee"; and (6) "[a]fter the report of the Investigating Committee is submitted, the application shall be voted upon, and, if elected, the Aerie may proceed with the initiation of the applicant."

[472 *F. Supp.* at 1176.]

Despite those formal published criteria, the court rejected private status because the club's formal admissions policy "[stood] in stark contrast to the admission process that . . . the Eagles Club actually uses," and showed little selectivity. *Ibid.* (noting further that club in one year turned down only three of over 1000 applicants and had 7000 to 8000 members at any one time).

A number of other cases, in considering the public versus private nature of an organization, have demanded that selectivity be actually employed in practice in accordance with formal admissions criteria. *See Nesmith v.*

Young Men's Christian Ass'n, 397 *F.*2d 96, 101 (4th Cir. 1968) (noting that despite "some of the trappings of a private club," including membership application, regularly recorded list of members, substantial dues, and membership cards to gain access to club facilities, "[e]xamination [] must go beyond these mere superficialities," and concluding that club is public establishment because almost every applicant is accepted to membership); *Rogers v. International Ass'n of Lions Clubs*, 636 *F. Supp.* 1476, 1479-80 (E.D. Mich. 1986) (characterizing club as public despite formal admissions criteria—including requirements that new member have "good moral character and good reputation in his community," be sponsored by current members, complete application forms, pass background investigation, and secure Board approval—concluding that "[w]hile it is true that this application procedure has the appearance of being elaborate, formal, and structured, in reality, it is not selective and almost all men who apply are admitted to membership"); *New York v. Ocean Club, Inc.*, 602 *F. Supp.* 489, 494-96 (E.D.N.Y. 1984) (concluding that uninformative application form, absence of background investigation of applicant, interview that merely informed applicant about club and its facilities without probing into applicant's background and character, and fact that no member was ever rejected, all demonstrated club was not genuinely selective, notwithstanding formal admission criteria in club constitution and bylaws requiring sponsorship and Board approval); *Brown v. Loudon Golf and Country Club, Inc.*, 573 *F. Supp.* 399, 402-03 (E.D. Wa. 1983) (holding that admission fee, membership ceiling, and requirements that two members sign, and Board approve, application were insufficient, without more. to show that procedures operated in practice to make club's membership practices selective).

2.

If an accommodation engages in little or no selectivity in choosing its members, this constitutes strong evidence that it is "public," and thus subject to the proscriptions of the LAD. *Accord Concord Rod and Gun Club, Inc. v. Massachusetts Comm'n Against Discrimination*, 524 *N.E.*2d 1364, 1367 (Mass. 1988) (noting that "determinative factor" in characterizing organization—already stipulated by parties as being "place" and "accommodation"—as "public," and thus subject to state antidiscrimination law, is "total absence of genuine selectivity in membership").

The mere fact that there is some genuine selectivity in acceptance of members is not incompatible with "public" status. That principle is supported by the understanding and practice of the Division on Civil Rights (Division), the administrative agency that is empowered under the LAD to enforce its antidiscrimination provisions. *See Nelson v. Board of Educ.*, 148 *N.J.* 358, 364 (1997) ("The interpretation of a statute by the administrative agency charged with its enforcement is entitled to great weight.").

The Division has held that some genuine selectivity may be rendered inconsequential when balanced with other overwhelmingly unselective membership criteria. *See Hinden v. United States Power Squadrons*, No. PO2S-105 (Div. on Civil Rights Dec. 21, 1973), *aff'd*, No. A-3104-73 (App. Div. July 18, 1975), *certif. denied*, 69 *N.J.* 382 (1975), *cert. denied*, 426 *U.S.* 943, 96 *S. Ct.* 3160, 49 *L. Ed.* 2d 1180 (1976). In *Hinden*, the Division held that the Power Squadrons, a national boating organization that had local chapters in New Jersey, was a public accommodation operating in violation of the LAD because it refused admission to women. The Power

Squadrons exhibited some genuine selectivity in the selection of new members, requiring the successful completion of a basic piloting course as a prerequisite for admission. The Division, however, recognized that the piloting course was itself a public accommodation because it was open to all members of the public free of charge, and regardless of sex or any other limitation. *Hinden, supra*, No. PO2S-105, slip op. at 2 (incorporating Sylvia B. Pressler, hearing examiner (now Presiding Judge, Appellate Division), *Findings of Fact and Conclusions of Law* 14 (June 1, 1973)). "Moreover, and almost without exception, every man who passe[d] the basic piloting examination [was] invited to membership," while every woman who passed was excluded. *Ibid.* The Division concluded that, despite the fact that the piloting test was used in the ad- missions process and was a genuine criterion in that a passing grade was required, on balance the Power Squadrons's "membership invitation [was] basically as publicly oriented as [was] the public piloting course itself." *Ibid.*

Additionally, other factors, traditionally relied upon in the determination of whether a place of accommodation is "public," may outweigh the presence of genuine selectivity in ultimately finding that an organization is subject to the LAD. *See ante* at — (slip op. at 33) (noting that broad public solicitation, maintenance of close relationships with government or other public accommodations, or similarity to enumerated or previously recognized public accommodations are factors that are helpful in determining whether organization is "public accommodation"); *Frank v. Ivy Club*, 120 *N.J.* 73, 104 (1990) (holding that eating club with very selective membership criteria was public accommodation because of its "symbiotic relationship" with university, which was itself subject to LAD).

In sum, membership selectivity is relevant but may not be determinative of whether an organization meets the LAD's definition of "place of public accommodation." Such membership selectivity, genuinely applied in practice, may show that a place of accommodation that is otherwise "public" satisfies the LAD's "distinctly private" exception. Conversely, the absence of genuine selectivity is always persuasive proof that an organization qualifies as "public."

3.

The reality is that Boy Scouts rarely, if ever, denies membership based on any selection criteria other than age or gender. *See ante* at — (slip op. at 46-51). According to *A Representative Membership*, a Boy Scouts publication prepared in 1975 for BSA Executive Board members; national and local council presidents, members and staff; district committee members; and commissioners:

> *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.* The National Council and Executive Board have always taken the position that Scouting should be made available for *all boys who meet entrance age requirements.*

[*Id.* at 2 (emphasis added).]

As a result of Boy Scouts' unselective membership criteria, the organization has more than five million youth and adult members in the United States, and over 100,000 in New Jersey.

Boy Scouts' lack of genuine selectivity is further underscored by the testimony of James William Kay, the highest ranking employee in Monmouth Council and the official who first made the decision to terminate Dale. Kay stated in deposition that he was not aware of any previous rejection by BSA's National Council of an adult application

for membership in Monmouth Council. Kay was likewise unaware of any membership rejection in the previous council with which he was affiliated for eight and one-half years. Moreover, the fact that Boy Scouts does not require new members to be sponsored by a current member is further evidence that Boy Scouts does not engage in a genuine selection process. *See Kiwanis, supra,* 806 *F.*2d at 475.

The Appellate Division properly viewed Boy Scouts' "undisputed invitation for membership in its literature to 'all boys,' " as rendering its stated " 'selectivity' criteria inconsequential." 308 *N.J. Super.* 516, 538.[2] The absence

---

[2] Courts and jurists of other jurisdictions have reached a similar conclusion. For example, in *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 *P.*2d 218, 236 (Cal. 1998), although the California Supreme Court held that the Boy Scouts is not the functional equivalent of "a classic 'public accommodation or amusement' " under California's common law, the court noted that "Boy Scouts is generally nonselective in its admission policies." *See also Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267, 1283 (7th Cir.) (Cummings, J., dissenting) (observing that "[m]embership [in Boy Scouts] is not selective"; "[o]ther than the mention of God in the oath, which must exclude an extremely small—though indeterminate—number of children, the only substantive requirement for membership is age, which is not so much a matter of selectivity as a basic common denominator"), *cert. denied*, 510 *U.S.* 1012, 114 *S. Ct.* 602, 126 *L. Ed.* 2d 567 (1993); *Schwenk v. Boy Scouts of Am.*, 551 *P.*2d 465, 473 (Or. 1976) (O'Connell, J., dissenting) ("[I]t is commonly known that membership in the Boy Scouts of America is open to any boy within the specified age group without any other limitation whatsoever."); *Merino v. San Diego County Council of the Boy Scouts of Am.*, No. 659236, slip op. at 9 (Cal. App. Dep't Super. Ct. July 7, 1994) (finding that "membership criteria for both juvenile and adult members [of Scouting] are non-selective"). *But see Welsh, supra,* 993 *F.*2d at 1276 ("Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the Boy Scouts Oath and Scout Law.").

of any evidence of genuine selectivity on the part of Boy Scouts compels the conclusion that Boy Scouts is "public."

II

Boy Scouts maintains that even if it is deemed a "place of public accommodation" that is subject to the LAD, its decision to expel Dale based on his expression of his sexual orientation is protected under the First Amendment. The Court rejects that defense because Boy Scouts has failed to demonstrate a sufficiently protectable expressive interest in respect of homosexuality. *Ante* at — (slip op. at 69-70).

The crux of the First Amendment analysis lies in an identification of the expressive interests of the organization and a determination of whether those interests are undermined or frustrated by the membership of the excluded person. Central to that inquiry is the question of whether membership was denied based on the person's identity or status *per se*, or alternatively, on the person's expressed views. We recognize today that Boy Scouts engaged in status-based discrimination when it terminated Dale. *Id.* at — (slip op. at 75, 77-78, 89). I fully concur in that reasoning and result. The Court's holding is especially significant because of the distinctive interdependence of expression and identity for lesbians and gay men, and the effect of that merger of speech and status on an organization's First Amendment freedom of expressive association.

A.

A hallmark of the case law defining the contours of the right of expressive association is an identifiable demarcation between a person's status and expression. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481

U.S. 537, 548, 107 *S. Ct.* 1940, 1947, 95 *L. Ed.* 2d 474, 486 (1987) (noting that because clubs "do not take positions on 'public questions,' including political or national issues," the inclusion of women, as such, as members will not "affect in any significant way the existing members' ability to carry out their various purposes"); *see also New York State Club Ass'n v. City of New York*, 487 *U.S.* 1, 13, 108 *S. Ct.* 2225, 2234, 101 *L. Ed.* 2d 1, 16 (1988) ("If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of . . . legitimate criteria for determining membership."); *Roberts v. United States Jaycees*, 468 *U.S.* 609, 627, 104 *S. Ct.* 3244, 3254, 82 *L. Ed.* 2d 462, 477 (1984) (holding that law prohibiting sex discrimination was not violative of all-male organization's freedom of expressive association in part because it "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members").

The rationale for drawing a distinction between status and expression, as explained in *Roberts, supra,* is that "unsupported generalizations" and stereotypes based on a person's identity are not permissible means of ascertaining the particular views of that person:

> In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, or that the organization's public positions would have a different effect if the group were not "a purely young men's association," the Jaycees relies solely on unsupported generalizations about the relative interests

> and perspectives of men and women. . . [W]e have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions. . . . [W]e decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.

[468 *U.S.* at 627-28, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478.]

In contrast to exclusion based on status-based stereotypes, when the denial of membership is premised on actual expression, the organization can legitimately claim a basis for its assessment that the excluded person would "change the content or impact of the organization's speech." *Id.* at 628, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478.

Organizations may rely on their First Amendment right to exclude potential members solely on the basis of status in certain narrowly prescribed circumstances. As the United States Supreme Court has explained:

> It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.

[*New York State Club Ass'n, supra*, 487 *U.S.* at 13, 108 *S. Ct.* at 2234, 101 *L. Ed.* 2d at 16.]

Thus, for example, when an organization has a unifying purpose that motivates its members to join together as an association or group, *i.e.*, a core purpose, and the inclusion of a particular person would be inconsistent or incompatible with that purpose, the expressive association rights of the organization would support the exclusion. *See Invisible Empire of the Knights of the Ku Klux Klan v. Town of Thurmont*, 700 *F. Supp.* 281, 289 (D. Md. 1988) (upholding exclusion of African American participants in political march because "group's primary purpose is to advocate one main concept—that blacks and whites should not mix. Allowing blacks to march with the KKK would change the primary message which the KKK advocates."). A "specific expressive purpose" is frequently, although not necessarily, the core or primary purpose of an organization. Such a central purpose, if compromised, would most evidently inhibit an association's ability to effectively advocate its viewpoints. The critical point is that a "specific expressive purpose" must be clear, particular, and consistent.

These considerations bear relevantly on the right of expressive association. The line between status-based and speech-based exclusion has been decisive to expressive association jurisprudence, even when that distinction was not readily apparent. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 *U.S.* 557, 115 *S. Ct.* 2338, 132 *L. Ed.* 2d 487 (1995), the Supreme Court held that GLIB, an organization of Irish lesbians and gay men, was properly excluded from marching in Boston's St. Patrick's Day parade under a banner conveying a message of Irish and lesbian and gay pride. The Supreme Court noted that it was this expression, and not the homosexual identity of the marchers themselves, that formed the petitioning parade organizers' basis for the exclusion of GLIB:

> [Petitioners do not object to] the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such,

> and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.

[*Id.* at 572, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503.]

The Supreme Court observed that "the record [] corroborates the expressive nature of GLIB's participation." *Id.* at 570, 115 *S. Ct.* at 2346, 132 *L. Ed.* 2d at 502. Specifically, the Supreme Court determined that "GLIB was formed for the very purpose of marching in [the parade] . . . in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade." *Ibid.*, 115 *S. Ct.* at 2346, 132 *L. Ed.* 2d at 501.

The Supreme Court also determined that the parade itself is a "form of expression, not just motion." *Id.* at 568, 115 *S. Ct.* at 2345, 132 *L. Ed.* 2d at 500. For that reason, the Supreme Court noted that "GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own," *id.* at 570, 115 *S. Ct.* at 2346, 132 *L. Ed.* 2d at 501, and that by engaging in that form of expressional activity, GLIB's inclusion was incompatible with or compromised the expressional activities of the parade itself.

Fundamental to the analysis of the Supreme Court, then, was its extrapolation from the record of a basis for concluding that GLIB had sought to engage in expression that was conspicuously and unmistakenly separate from simply serving to identify its members. The Supreme

Court's description of that expression as distinct from status was central to its *Hurley* holding.

1.

This case does not squarely fall within the paradigm suggested by those authorities defining the contours of the expressive association right because the speech here is so closely intertwined with the identity of the speaker. Thus, as the Court recognizes, while Boy Scouts frames its expulsion of Dale as grounded on an objection to his expression of his homosexuality, that exclusion is tantamount to one based on Dale's status as a homosexual. *Ante* at — (slip op. at 89); *cf. Able v. United States*, 880 *F. Supp.* 968, 973 (E.D.N.Y. 1995) (noting in challenge to constitutionality of military's "don't ask, don't tell" policy that plaintiffs, in stating that they are homosexuals, "have done no more than acknowledge who they are, that is, their status," and that such speech "implicates the First Amendment value of promoting individual dignity and integrity"), *vacated*, 88 *F.*3d 1280 (2d Cir. 1996) (vacating primarily on ground of judicial deference to military).[3]

The Court's recognition of the speciousness of drawing a distinction between discrimination grounded in expression versus status in this context, *ante* at —— (slip op. at 89), was previously recognized by Justice Brennan who observed that sometimes " 'speech' [] is better evaluated as no more than a natural consequence of [a person's] sexual orientation." *Rowland v. Mad River Local Sch. Dist.*,

---

[3] The District Court in *Able* further rejected as unconstitutional "a policy that purportedly directs discharge based on 'conduct' " while "defining 'conduct' to include statements revealing one's homosexual status" because such policy transmogrifies "a mere acknowledgment of status" into "an admission of misconduct." 880 *F. Supp.* at 975.

470 *U.S.* 1009, 1017 n.11, 105 *S. Ct.*, 1373, 1379 n.11, 84 *L. Ed.* 2d 392, 397 n.11 (1985) (Brennan, J., dissenting from denial of cert.). In *Rowland*, the jury found that the petitioner, a schoolteacher, had been dismissed from her job "for no other reason" than "because she was a homosexual who revealed her sexual preference." *Id.* at 1009, 105 *S. Ct.* at 1373, 84 *L. Ed.* 2d at 392 (citation omitted). Justice Brennan likened the petitioner's expression of her sexual identity to fellow employees to the generally held knowledge of co-workers about "whom their fellow employees are dating or to whom they are married." *Ibid.* In such instances, wrote Justice Brennan, "it is realistically impossible to separate [] spoken statements from [] status." *Ibid.*

The confluence of status and expression when both relate to the speaker's sexual orientation is "self-identifying speech." Such expression as 'the statement 'I am gay' is illocutionary— like the statements 'J'accuse,' 'I thee wed,' or 'I bet you,' it not only describes, but performs, the action named." Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 *Yale L.J.* 485, 550 (1998) (footnote omitted). Self-identifying speech "makes the connection between speech and status," and is illustrated by the ACT UP slogan, "I am out, therefore I am." *Ibid.* (footnotes omitted). Some scholars maintain that the ability to self-identify is critical to being a lesbian or gay man. *See* Brian C. Murchison, *Speech and the Self-Realization Value*, 33 *Harv. C.R.-C.L. L. Rev.* 443, 468 (1998) ("Self-realization [] is what speech (including expressive activity) makes possible."); Nan D. Hunter, *Identity, Speech, and Equality*, 79 *Va. L. Rev.* 1695, 1718 (1993) ("Self-identifying speech does not

merely reflect or communicate one's identity; it is a major factor in constructing identity.").

For purposes of antidiscriminaton laws, the relevance of self-identifying speech is not so much in realizing identity, as in its singular role in revealing identity. The importance of self-identifying speech inheres in its legal effect—that is, in the functional capacity of such speech to disclose or clarify the status of a person when that status is entitled to protection against discrimination. A person covered by the LAD has the right to enjoy his or her protected status without suffering discrimination because of who he or she is. If the very means of making those characteristics known—self-identification—can legitimately justify discrimination against that person, then the antidiscrimination protections of the LAD are illusory.

The interdependence of identity and speech is particularly evident where a distinguishing characteristic of identity is not readily apparent, as in the case of sexual orientation. In that regard, there is a clear parallel between status based on sexual orientation and that based on religion. *See* David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 *Ohio St. L.J.* 491 (1994). Unlike characteristics that are obvious upon casual observation, religion and sexual orientation are unknowable unless the person self-identifies.

Courts have recognized that expression and identity can be interdependent in the context of religion. *See Islamic Center v. City of Starkville*, 840 *F.*2d 293, 300 (5th Cir. 1988) (noting that expression of religious beliefs "communicates to outsiders the identity of the group and [a person's] own identity as a member of it, a form

of self-expression"). Accordingly, the United States Supreme Court has held that in order to adequately insulate religion from state interference, government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Resources v. Smith*, 494 *U.S.* 872, 877, 110 *S. Ct.* 1595, 1599, 108 *L. Ed.* 2d 876, 884 (1990).

The significance of the connection between identity and expression in respect of sexual orientation has been similarly recognized by New Jersey's Legislature in enacting protections for sexual minorities in the LAD. *See ante* at —— (slip op. at 82-84). When amending the LAD in 1991 to prohibit discrimination based on "affectional or sexual orientation," the Legislature defined the scope of protection to encompass both concepts:

> "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, *identity or expression*, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

[*N.J.S.A.* 10:5-5(hh) (emphasis added).]

In so doing, the Legislature affirmed the significant role of self-identifying speech for lesbians and gay men, much in the same way that the Supreme Court has acknowledged that role in respect of religion.

2.

A prime example of self-identifying speech is the language of "coming out," that is, publicly acknowledging one's self as lesbian or gay. Dale's acknowledgement of his homosexuality, therefore, constitutes self-identifying speech, and his exclusion from Boy Scouts cannot be based solely on that expression. As self-identifying speech,

"it is realistically impossible to separate [Dale's] spoken statements from [his] status." *Rowland, supra*, 470 *U.S.* at 10017 n.11, 105 *S. Ct.* at 1379 n.11, 84 *L. Ed.* 2d at 397 n.11. Thus, as the Court concludes, Dale's expulsion was not based on his expression of views, but on his sexual orientation. *Ante* at —— (slip op. at 75, 77, 89).

The Court explains that Dale first acknowledged his own sexual orientation to himself, his family, and his friends while he was a student at Rutgers University. *Id.* at —— (slip op. at 16). Boy Scouts became aware of Dale's sexual orientation only by way of a newspaper article,[4] *id.* at —— (slip op. at 16-17), which identified Dale as gay:

> James Dale, 19, co-president of the Rutgers University Lesbian/Gay Alliance . . . said he lived a double life while in high school, pretending to be straight while attending a military academy.
>
> He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.
>
> "I was looking for a role model, someone who was gay and accepting of me," Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends.

[Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens, Star-Ledger* (Newark), July 8, 1990, § 2, at 11.] To treat this public identification as only expression ig-

---

[4] The article reported on a conference held at Rutgers University, sponsored by several groups including the National Association of Social Workers-New Jersey Task Force on Lesbian/Gay Issues and Rutgers University School of Social Work, which addressed the unique problems faced by homosexual teenagers struggling to come to terms with their sexual orientation, including an alarmingly high incidence of suicide attempts.

nores the reality that such speech is inextricably linked to Dale's status as a gay man. As an editorial commenting on the Appellate Division's judgment in this case recognized:

> The Boy Scouts would never have known if James Dale hadn't told them. That has always been the difference about the movement for gay rights. Homosexuals aren't visible. They have to stand up and identify themselves in order to be discriminated against.

[*The Invisible Victory, N.Y. Times*, March 12, 1998, at A26.]

Had Dale expressed more general views on the morality, social implication, history, or etiology of homosexuality in his role as a Boy Scouts leader, which directly conflicted with Boy Scouts' stated positions, Boy Scouts could claim that its discrimination was based purely on expression.[5] Dale's statement of his identity, however, does not express a view about homosexuality generally or specifically advocate that homosexuality is moral. *See Merino, supra*, No. 659236, slip op. at 16 (noting that "acknowledgment of homosexuality does not translate to a 'teaching' that homosexuality is proper or improper any more than a Scout admitting he is Catholic amounts to a 'teaching'

---

5 A recent California case, wherein a young man was denied Boy Scouts membership after he stated to a local council's executive director that he wanted to join the Boy Scout program "because he so firmly believed personally in a homosexual lifestyle that there was . . . not anything wrong with it, and he wanted to make sure that other kids understood that," illustrates this distinction. *See Curran, supra*, 952 *P.*2d at 254 (Kennard, J., concurring) (observing that requiring plaintiff's membership would have violated Boy Scouts' right to expressive association). Here, unlike in *Curran*, Dale did not seek membership in order to challenge Boy Scouts' purported views on homosexuality or to project his own views on other scouts.

that Catholicism is the only proper religion"). As the Court recognizes, "Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' policies. . . . [and] there is no indication that Dale intends to actively 'teach' anything whatsoever about homosexuality as a scout leader, or that he will do other than Boy Scouts instructs him to do—refer boys to their parents on matters of religion and sex." *Ante* at —— (slip op. at 87).

3.

Because Boy Scouts excluded Dale based on his status as a homosexual, Boy Scouts must demonstrate a "specific expressive purpose" in respect of homosexuality for that exclusion to be permissible. *See supra* at —— (slip op. at 20-21). That requirement demands a showing of a clear, particular, and consistent message. *Supra* at —— (slip op. at 21).

Boy Scouts' position in respect of homosexuality cannot be characterized as clear or particular. While Boy Scouts advocates traditional moral values through its Boy Scout programs, *ante* at —— (slip op. at 71), it is not at all apparent that this position embraces any view concerning homosexuality. Further, while Boy Scouts professes that the terms "morally straight" and "clean" in the Scout Oath and Law stand for the proposition that homosexuality is immoral, those terms fail to convey any clear or particular message on homosexuality or the precept that homosexuality is immoral. *See ante* at — (slip op. at 72-73). This fact is underscored by Dale's testimony, as well as the affidavits of hundreds of other scouts, that they were unaware of any BSA position on the morality of homosexuality.

The inconsistency and vagueness of Boy Scouts' position regarding its members' views on morality generally,

and homosexuality in particular, further belies the existence of a "specific expressive purpose" in this regard. *See id.* at —— (slip op. at 73-75). Boy Scouts acknowledges that "moral fitness" is an individual choice and defers its ultimate definition to its members:

> Morality . . . concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by our conscience or ethical judgment." . . . In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what *his head* and *his heart* tell *him* is right. And the courage to refuse to do what *his heart* and *his head* say is wrong.

[*Scoutmaster Handbook* 71 (1990) (emphasis added).] Dale appears to have heeded and lived by Boy Scouts' dictate that individual conscience should guide a Scout's moral decision-making. Dale wrote in his affidavit:

> As a Scout, I promised to live by the Scout Oath. . . . I believed that the Scout Oath stood for my commitment to live an honorable life, *to set standards for myself*, and to do my best to serve others. . . . As I grew older, my commitment to Scouting deepened . . . Scouting . . . *taught me how to deal with the ethical choices I encountered* as a teenager.

Boy Scouts' official position on issues of sexuality is that "boys should learn about sex and family life from their parents, consistent with their spiritual beliefs." *Ante* at — (slip op. at 13). Numerous religious denominations sponsoring Boy Scout units subscribe to the view that homosexuality is compatible with their religious precepts. *Id.* at — (slip op. at 12-13). Boy Scouts' directive that its members should follow those entities on matters of individual morality, including sexual mores, indicates that tolerance concerning homosexuality is implicit in Boy Scouts' own message on morality. *See id.* at — (slip. op. at 79) (noting that exclusion of members solely on basis of their homosexuality is "antithetical to the organization's goals and philosophy" and "inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership").

Moreover, BSA only charters and approves sponsoring organizations that are "'compatib[le] with the aims and purposes of [Boy Scouts].'" *Id.* at — (slip op. at 6). The Court recognizes that the fact that BSA has repeatedly renewed the charters of religious organizations adhering to a view that homosexuality is moral, negates and undermines the alleged consistency of a contrary message. *See id.* at — (slip op. at 74-75). Additionally, approximately one-fifth of the BSA chartering organizations in New Jersey are public schools and school affiliated groups, and over two hundred Boy Scout units are sponsored by other public entities, such as fire departments and law enforcement agencies. *Ante* at — (slip op. at 7). The LAD mandates that those entities may not discriminate on the basis of affectional or sexual orientation. *N.J.S.A.* 10:5-4. The continued sponsorship of Boy Scouts units by such public entities is at odds with Boy Scouts' purported view on homosexuality, and thus constitutes further direct evidence of the inconsistency of Boy Scouts' message.

Because Boy Scouts has not established a clear, particular, and consistent message concerning homosexuality, the First Amendment cannot excuse Boy Scouts' status-based discrimination against a member, based solely on his sexual orientation, in violation of the LAD.

B.

Self-identifying speech that serves only to reveal the status of the speaker is always vulnerable to misinterpretation and misunderstanding based on stereotypes that are associated with the speaker's status. The reliance on such stereotypes to import additional meaning to self-identifying speech is impermissible.

The Court observes that "[t]he United States Supreme Court has not hesitated to uphold the enforcement of a state's antidiscrimination statute against an expressive association claim based on assumptions in respect of status that are not part of the group members' shared expressive purpose." *Ante* at — (slip op. at 75). The very reason for the distinction between status-based and speech-based exclusion in the Supreme Court's expressive association jurisprudence is that such stereotypical assumptions may not be relied upon to ascertain a person's views. *See supra* at — (slip op. at 19-20). In contrast, an organization may rely on expression to justify a speaker's expulsion from membership when that speaker's expression encompasses "ideolog[y] or philosoph[y that is] different from those of [the organization's] existing members." *Roberts, supra,* 468 *U.S.* at 627, 104 *S. Ct.* at 3254, 82 *L. Ed.* 2d at 477. When an organization does not ground its decision to exclude on stereotypes, but rather on the expressed views of the speaker, that decision is based on a verifiable measure of whether the speaker's membership would be antithetical to the organization's purposes. *See supra* at — (slip op. at 20).

In the context in which speech serves to identify the speaker, expression of one's sexual orientation is inseparable from status. *See supra* at — (slip op. at 23-28). Under that construct, status itself is revealed and realized by speech. It follows that expression that serves only to

self-identify cannot be further infused with additional content that is derived from status-driven generalizations or stereotypical assumptions serving as "shorthand measures" of a person's unexpressed views. *See New York State Club Ass'n, supra,* 487 *U.S.* at 13, 108 *S. Ct.* at 2234, 101 *L. Ed.* 2d at 16. Stripped of all adverse implications that rest solely on such stereotypes, statements like "I am gay" express nothing more than the sexual orientation of the speaker; no legitimate inference about the speaker's morality can be drawn. Accordingly, a homosexual cannot be said to interfere with the expressive associational rights of Boy Scouts merely because he publicly self-identifies as such.

The same repudiation of status-based stereotypes compelled by the Supreme Court's First Amendment jurisprudence is demanded by the LAD. *See ante* at — (slip. op. at 79-82) (observing that "[t]he invocation of stereotypes to justify discrimination is all too familiar," and that LAD is intended to "eliminate the destructive consequences of discrimination from our society"). The Appellate Division soundly observed that by amending the LAD in 1991 to protect persons from discrimination based on "affectional or sexual orientation," the Legislature "implicit[ly] recogni[zed] that discrimination based on 'archaic' and 'stereotypical notions' about homosexuals that bears no relationship to reality cannot be countenanced." *Ante* at — (slip op. at 82-83) (quoting 308 *N.J. Super.* at 549). Accordingly, we emphatically reject the use of stereotypical assumptions about homosexuals as justification for discrimination based on "affectional or sexual orientation." *Id.* at — (slip op. at 83-84).

One particular stereotype that we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that con-

vincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society. *See* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research* 1 *L. & Sexuality* 133, 134 (1991) (presenting "considerable body of social science data" that counter "longstanding cultural myths and stereotypes that depict lesbians and gay men as immoral, criminal, sick, and drastically different from what most members of society would consider 'normal' "). Like stereotypes about an individual based on sex or race, similar assumptions about a lesbian or gay man are false and unfounded, and reveal nothing about that individual's moral character, or any other aspect of his or her personality:

> A homosexual orientation tells nothing reliable about abilities or commitments in work, religion, politics, personal and social relationships, or social activities, except to the extent that in many areas the lives of gay people are frequently conditioned by the attitudes of others.

[*Gay Rights Coalition v. Georgetown Univ.*, 536 *A*.2d 1, 37 (D.C. App. 1987) (citations omitted).]

In short, a lesbian or gay person, merely because he or she is a homosexual, is no more or less likely to be moral than a person who is a heterosexual. Accordingly, as the Appellate Division recognized below, there is no reason to view "a gay scoutmaster, solely because he is a homosexual, [as lacking the] strength of character necessary to properly care for [and] impart BSA humanitarian ideals to the young boys in his charge." 308 *N.J. Super.* at 552. "Plaintiff's exemplary journey through the BSA ranks is testament enough that these stereotypical notions about homosexuals must be rejected." *Ibid.*

The Appellate Division also observed that another particularly pernicious stereotype about homosexuals is implicit in Boy Scouts' arguments: "the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts." *Id.* at 551. The myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished. *See* Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 *Pediatrics* 41 (1994) (concluding that most child abuse appears to be committed by situational child abusers who present themselves as heterosexuals); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 *Archives Sexual Behav.* 175, 180-81 (1978) (concluding that "[h]omosexuality and homosexual pedophilia are not synonymous . . . . [and] that the adult heterosexual male constitutes a greater sexual risk to underage children than does the adult homosexual male"); *see also* Herek, *supra*, 1 *L. & Sexuality* at 152-56 (citing studies and concluding that "[i]t appears from these studies that gay men are no more likely than heterosexual men to molest children"); David Newton, *Homosexual Behavior and Child Molestation: A Review of the Evidence*, 13 *Adolescence* 29 (1978) (surveying data concerning male homosexuality and child molestation and concluding that "there is no reason to believe that anything other than a random connection exists between homosexual behavior and child molestation").

In light of this evidence, the belief that a gay scoutmaster poses a risk to young boys because of his sexual orientation is patently false, and cannot in any way bolster Boy Scouts' First Amendment defense. Accordingly, it must be rejected as an unfounded stereotype. *Accord Doe v. British Univ. N.A. Club*, 788 *F. Supp.* 1286, 1292

(D. Conn. 1992) (rejecting argument that child molestation was "foreseeable consequence of [] sexual orientation," noting that plaintiff "offers not one scintilla of credible evidence to suggest that homosexuals pose a greater risk of committing sexual molestation, assault, or criminal conduct than heterosexuals. . . . To find otherwise would be to hold that homosexuals are predisposed towards molesting or sexually assaulting minor males simply by virtue of their sexual orientation. The court cannot and will not adopt such a position absent sufficient evidentiary support.").

The trial court in this case impermissibly invoked stereotypical assumptions about homosexuals to give a specific meaning to "traditional morality," which it then ascribed to Boy Scouts. *Dale v. Boy Scouts of Am.*, No. MON-C-330-92, slip op. at 39-41 (Ch. Div. Nov. 3, 1995). The court, equating homosexuality with sodomy, expressed the view that because at the founding of Boy Scouts in 1910, "sodomy was a serious criminal offense in every state in the Union. . . . [t]o suggest that Boy Scouts had no policy against active homosexuality is nonsense."[6] *Id.* at 39-40. The court reasoned that sodomy laws were expressive of societal moral values, and from that concluded that Boy Scouts adopted and continues to adhere to those mores today.

Sodomy laws, as applied against homosexuals, reflect the same stereotypical thinking that we now recognize as invidious, including untenable assumptions about the morality of homosexuals, that have long been superseded

---

[6] In addition to the court's reliance on stereotypes, its failure to differentiate between Dale's status as a homosexual and homosexual conduct was manifestly in error. *E.g.*, Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 *Va. L. Rev.* 1721, 1736 (1993).

and overcome. In successfully defending the constitutionality of its sodomy statute, for example, the State of Georgia relied on the stereotypes of homosexuals as immoral people and child molesters. *See Bowers v. Hardwick*, 478 *U.S.* 186, 195, 106 *S. Ct.* 2841, 2847, 92 *L. Ed.* 2d 140, 149 (1986); Lynne N. Henderson, *Legality and Empathy*, 85 *Mich. L. Rev.* 1574, 1641-49 (1987) (discussing arguments of Georgia Attorney General in *Bowers*). That same sodomy statute was later struck down as unconstitutional under the Georgia State Constitution. *Powell v. State*, 510 *S.E.*2d 18 (Ga. 1998). The 1979 repudiation of New Jersey's sodomy statutes, *N.J.S.A.* 2A:143-1, -2, is further evidence of the evolution in social thinking about homosexuality.

Sodomy laws and their implicit moral assumptions about homosexuals very much parallel miscegenation statutes, which were grounded in similar stereotypical notions concerning the morality of African Americans. *See Bowers, supra*, 478 *U.S.* at 210 n.5, 106 *S. Ct.* at 2854 n.5, 92 *L. Ed.* 2d at 158 n.5 (Blackmun, J., dissenting) (noting that parallel between miscegenation and sodomy laws "is almost uncanny"); *id.* at 216 n.9, 106 *S. Ct.* at 2857 n.9, 92 *L. Ed.* 2d at 162 n.9 (Stevens, J., dissenting) (observing that "miscegenation was once treated as a crime similar to sodomy"). Miscegenation laws, which existed in many states at Boy Scouts' founding in 1910, were grounded in antiquated notions of race and morality and were considered valid "measures designed to maintain White Supremacy"[7] until declared unconstitutional by

---

[7] The trial court in *Loving*, for example, cited the following justification for Virginia's miscegenation statute:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no

the United States Supreme Court. *Loving v. Virginia*, 388 *U.S.* 1, 11-12, 87 *S. Ct.* 1817, 1823-24, 18 *L. Ed.* 2d 1010, 1017-18 (1966). The indefensibility of basing contemporary moral views regarding race on those laws is obvious. The same is true of placing current reliance on the archaic moral views underlying sodomy laws, which are totally inconsistent with present day conceptions of homosexuality.

It is not tenable to conclude that because at one time "traditional moral values" were based on unsupportable stereotypes about homosexuals, those values have survived and endured unchanged in contemporary times. It is similarly untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts—a federally chartered and nationally recognized organization with significant ties to governmental institutions and public entities that fully adhere to contemporary laws rejecting anachronistic stereotypes about homosexuality—remains entrenched in the social mores that existed at the time of its inception.

Stereotypes cannot be invoked to extend the meaning of self-identifying expression of one's own sexual orientation, and thereby become a vehicle for discrimination against homosexuals. Such stereotypes, baseless assumptions, and unsupported generalizations reflecting a discredited view of homosexuality as criminal, immoral and improper are discordant with current law and public policy. Accordingly, they cannot serve to define contemporary social mores and morality. Boy Scouts' adherence to "traditional moral values," its "belief in moral values" and its uncontroverted purpose to "encourage the moral development of its members," *ante* at — (slip. op.

---

cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

[*Id.* at 3, 87 *S. Ct.* at 1819, 18 *L. Ed.* 2d. at 1013.]

at 71), remain undisturbed and undeterred by Dale's open avowal of his homosexuality.

III

For the foregoing reasons, I concur in the opinion of the Court.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2427-95T3

JAMES DALE,
Plaintiff-Appellant,
v.

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL BOY SCOUTS OF AMERICA,
Defendants-Respondents.

Argued December 8, 1997—Decided Mar. 2, 1998

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County

Before Judges Havey, Landau and Newman.

The opinion of the court was delivered by HAVEY, P.J.A.D.

Plaintiff James Dale was expelled from his position as an Assistant Scoutmaster with defendant Monmouth Council, Boy Scouts of America when he publicly declared he was a homosexual. He was expelled by the Boy Scouts of America (BSA) because of its policy excluding avowed

homosexuals from membership in its organization. We conclude that: (1) the BSA is a place of public accommodation under New Jersey's Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -42; (2) the BSA's expulsion of plaintiff from his position with the BSA violated the LAD by depriving him of a public accommodation; and (3) the LAD's prohibition of the BSA's policy of excluding gay members does not infringe upon defendants' freedom of expressive association. Accordingly, except to affirm the dismissal of plaintiff's common law claim, we reverse and remand for further proceedings.

The BSA charters local groups to maintain units including Cub Scout Packs (boys under eleven), Boy Scout Troops (boys eleven to eighteen), and Explorer Posts (young men and women fourteen through twenty). The troops are sponsored by religious, civic, fraternal or educational organizations, and other groups whose goals are compatible with those of the BSA.

As of December 1992, the BSA reported 3,453,315 youth members and 1,172,485 adults registered in 123,045 traditional Scout units. The national organization is headed by a National Council and divided into regional administrative units and subdivided into local councils. Monmouth Council has jurisdiction over the geographical area in which plaintiff served. There are approximately 400 local councils. Monmouth Council was incorporated in 1924. In 1991, Monmouth Council had 9,446 youth members and 2,781 adults registered in 215 units.

The BSA was chartered by an Act of Congress in 1915, with its stated purpose:

> to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scout-

craft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts.

The BSA's bylaws provide: "In achieving this purpose, emphasis shall be placed upon its educational program and the oaths, promises, and codes of the Scouting program for character development, citizenship training, mental and physical fitness." The BSA Mission Statement provides:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> The values we strive to instill are based on those found in the Scout Oath and Law:

SCOUT OATH

On my honor I will do my best
To do my duty to God and my
country and to obey the Scout Law;

To help other people at all times;

To keep myself physically strong
mentally awake, and morally straight.

SCOUT LAW

A Scout is:

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

According to the 1990 Boy Scout Handbook, understanding and agreeing to live by the Scout Oath and the Scout Law are among the joining requirements. According to the Declaration of Religious Principle in the BSA bylaws, although scouting is nonsectarian, all members must recognize an obligation to God.

The Scout Law, set forth in the 1911 Official Handbook for Boys, has remained fundamental and unchanged. The 1936 Handbook for Scoutmasters described the Scout Law as "the foundation upon which the whole Scout Movement rests." It explained:

> The genius of Scouting is most evident in the Law of the Movement. It was based upon the codes of old, transformed into a positive, living ideal for the modern boy, devised as *a guide to his actions rather than as repressive of his faults*. That is what makes the Scout Law outstanding.

The Scout Law neither commands nor prohibits, but positively states these desired qualities.

Plaintiff became a Cub Scout at the age of eight and remained an extremely active and successful youth member of the BSA, achieving the rank of Eagle Scout. In March 1989, seven months after his eighteenth birthday on August 2, 1988, he applied for adult membership and was approved. He then served as an Assistant Scoutmaster for Troop 73 in Matawan, during periods when he was not away at college.

Plaintiff has been a devoted and exemplary Boy Scout. He earned thirty merit badges, advanced to the highest rank, and held numerous trooper leadership positions, including Junior Assistant Scoutmaster. In addition, he was active in the Order of the Arrow, an affiliated honor camping association. In the Order of the Arrow, he was

chosen for the highest possible honor, Vigil, and also held numerous offices. Plaintiff was also selected as a delegate to the 1985 National Boy Scout Jamboree, and was chosen to speak at Monmouth Council functions on more than one occasion.

On August 5, 1990, plaintiff, twenty years old at the time, received a letter dated July 19, 1990, from James W. Kay, Council Executive of Monmouth Council, informing him that his registration was revoked. Registration is a prerequisite for service as a volunteer adult leader. The letter said in part:

> After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America.
>
> You should understand that BSA membership registration is a privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth.

Plaintiff answered by letter dated August 8, 1990, asking the grounds of the decision. In a letter dated August 10, 1990, Kay responded: "The grounds for this membership revocation are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." Kay explained later in a deposition that he became aware that plaintiff was an affirmed homosexual through a newspaper article. The article, published on July 8, 1990, in the Newark Star Ledger, was entitled, "Seminar addresses needs of homo-

sexual teens." It pictured plaintiff, a Rutgers student; identified him as co-president of the Rutgers University Lesbian/Gay Alliance; and quoted him as saying that he had pretended to be straight while in high school, "only admitting his homosexuality during his second year at Rutgers." According to Kay, plaintiff demonstrated his failure to live by the Scout Oath and Law by publicly avowing that he was a homosexual.

By letter dated November 27, 1990, Charles D. Ball, Assistant Regional Director, Northeast Region, BSA, informed plaintiff that the Northeast Region Review Committee supported the decision of Monmouth Council. After further correspondence, a December 21, 1990, letter from BSA's legal counsel David K. Park to plaintiff's counsel explained: "As your client is apparently an avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting."

According to plaintiff, he was "devastated" by the instruction to sever relations with scouting, which he interpreted to mean that he was not only removed from his position as Assistant Scoutmaster, but also stripped of all his scouting honors, including his Eagle Scout status. However, according to Kay, plaintiff was not stripped of any awards he had earned as a youth, including his attainment of Eagle Scout rank, and his membership revocation was kept confidential.

According to the BSA Rules and Regulations, to serve in an adult leadership position, an individual must be recommended by the scout executive, approved by the council executive board, and be at least twenty-one (eighteen for assistant leaders). All leaders must be commissioned annually. The BSA bylaws provide: "No per-

son shall be approved as a leader unless, in the judgment of the Corporation, that person possesses the moral, educational, and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require." The 1990 Troop Committee Guidebook lists "[h]igh moral standards" and "[c]ommitment to the ideals of Scouting" as the top two characteristics sought in a Scoutmaster. It also suggests that the same standards used to choose a Scoutmaster should be used to qualify Assistant Scoutmasters (eighteen and up).

The 1972 Scoutmaster's Handbook emphasized the leaders' duty as role models, and advised:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons.
>
> . . . .
>
> What you are speaks louder than what you say. This ranges from simple things like wearing a uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.

According to Parvin L. Bishop, National Director of Program of the BSA, the requirements that a scout be "morally straight" and "clean" are inconsistent with homosexuality, and therefore known or avowed homosexuals or those who advocate to scouting youth that homosexual conduct is morally straight or clean, will not be registered as adult leaders. The BSA literature does not detail prohibited sexual conduct, but the 1990 Boy Scout Handbook includes a section on "Sexual Responsibility," which summarizes responsibilities to women, to children, to the scout's beliefs, and to himself. It says in part:

> For the followers of most religions, sex should take place only between married couples. . . .
>
> An understanding of wholesome sexual behavior can bring you lifelong happiness. . . .
>
> You owe it to yourself to enrich your life by learning what is right.

In a policy statement dated March 17, 1978, addressed to Executive Committee Members, the National Council asserted that an individual who openly declares himself to be a homosexual would not be selected to be a volunteer scout leader, be registered as a unit member, or be employed as a professional or nonprofessional. This was the earliest express statement concerning homosexual members that defendants produced. Later Position Statements affirmed that stance.

In a Position Statement dated January 1993, several years after the revocation of plaintiff's membership, the BSA stated in part:

> The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts.
>
> The reality is that Scouting serves children who have no knowledge of, or interests in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.
>
> Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law.

It summarized the BSA position:

> The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.
>
> We do not believe that homosexuals provide a role model consistent with these expectations.
>
> Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

Plaintiff filed a six-count complaint in the Superior Court, Chancery Division, alleging that defendants' revocation of his membership and his expulsion as an Assistant Scoutmaster violated the LAD, as well as certain common law rights. In the complaint he seeks both reinstatement and damages. Plaintiff filed a notice of motion for partial summary judgment seeking a declaration that he had been deprived of an accommodation in violation of the LAD. He also demanded an immediate reinstatement to his position as Assistant Scoutmaster. Defendants filed a cross-motion for summary judgment on all counts.

In granting summary judgment to defendants, the trial judge determined that the parties had stipulated that plaintiff was "a sexually active homosexual." The judge found that the BSA had consistently excluded from youth and adult membership any self-declared homosexual and that the BSA considered homosexual conduct neither "morally straight" under the Scout Oath nor "clean" under the Scout Law. The judge relied on the entrenched biblical and historical view of homosexuality as not only morally wrong, but criminal, as a basis for the presumption that, from its inception, the BSA implicitly subscribed to that historical view as well.

The judge concluded that plaintiff had no cause of action under the LAD because the BSA was not a "place of public accommodation" as defined by the Act. The judge also agreed with defendants that they qualified for the LAD exclusion in *N.J.S.A.* 10:5-5(*l*) for any "institution . . . which is in its nature distinctly private[.]" Finally, the judge concluded that defendants' "First Amendment freedom of expressive association rights prevent[ed] government from forcing them to accept [plaintiff] as an adult leader-member" in view of defendants' historical belief that homosexual conduct was morally wrong, and "[t]he presence of a publicly avowed active homosexual as an adult leader of boy scouts is absolutely antithetical to the purpose of Scouting."

The parties agree that there are no genuine issues of material fact. Accordingly, the issues raised by this appeal may be resolved as a matter of law.

I

Plaintiff contends that the BSA is a place of public accommodation under the LAD, prohibited from discriminating on the basis of affectional or sexual orientation. Plaintiff argues that his expulsion from the Boy Scouts and his position as an Assistant Scoutmaster violated the LAD by depriving him of the privileges and advantages of scouting based solely on his sexual orientation.

The LAD provides:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national

origin, ancestry, age, marital status, *affectional or sexual orientation,* familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

[*N.J.S.A.* 10:5-4 (emphasis added).]

The categories "affectional or sexual orientation" were added in 1991. *L.*1991, *c.* 519, § 2. " 'Affectional or sexual orientation' means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." *N.J.S.A.* 10:5-5hh.[1]

The LAD renders unlawful certain employment practices or discriminations. *N.J.S.A.* 10:5-12. Plaintiff asserts in his complaint (first cause of action) that defendants have violated *N.J.S.A.* 10:5-12f, which provides in pertinent part that it is unlawful:

> For any owner, . . . agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, . . . on account of the . . . affectional or sexual orientation . . . of such person. . . .

In its definitions, the LAD lists, expressly without limitation, numerous places of public accommodation, which

1 Although plaintiff's membership was revoked in 1990, before the category for sexual orientation was added to the LAD, he later sought reinstatement in reliance on the LAD amendment. Defendants do not contend the "affectional or sexual orientation" provision of the LAD is inapplicable.

"shall include" such places as hotels, camps, shops, restaurants, theaters, swimming pools, hospitals, libraries, colleges and universities. *N.J.S.A.* 10:5-5(*l*). It further provides:

> Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any education facility operated or maintained by a bona fide religious or sectarian institution. . . .

[*Ibid.*]

The trial judge held that:

> BSA is not a "place of accommodation" under *N.J.S.A.* 10:5-12(f) and as defined in *N.J.S.A.* 10:5-5(*l*). The lengthy list set forth in the definition is a list of *places*—not one of organizations. A physical place to which one may point is clearly intended.

He added:

> A Boy Scout troop bears no similarity to the enumerated places of public accommodation. It consists of a small group of boys and their adult leaders who meet together in various places, viz. their regular meeting hall, in tents during summer camp or at other scout gatherings on scout-owned properties. None of those activities or places are open to the public. The benefits to the boys spring not from the "facility" but from their interaction, training and experiences as a group. Those goals and objectives are totally different from "places" to which the public is invited.

The question whether the BSA is a "place of public accommodation" or "business" has been the subject of

lively debate in recent years in other jurisdictions. *See generally* John E. Theuman, Annotation, *Exclusion or Expulsion From Association or Club As Violation of State Civil Rights Act*, 38 *A.L.R.* 4th 628 (1985) (collecting cases). The extreme divergence of views on the social issues implicated is emphasized by the prevalence of vigorous dissenting opinions in most cases.

In *Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267 (7th Cir.), *cert. denied*, 510 *U.S.* 1012, 114 *S.Ct.* 602, 126 *L.Ed.*2d 567 (1993), the BSA denied membership to a boy who refused to affirm a belief in God, as required by the Boy Scout Oath. *Id.* at 1268. The Seventh Circuit held that the BSA was not a place of public accommodation under Title II of the Civil Rights Act of 1964, 42 *U.S.C.A.* § 2000a, because the statute by its own terms included only an entity that serves the public and may be classified as an "establishment," "place," or "facility," and did not include a membership organization unconnected to a structural facility. *Id.* at 1269. Likewise, the Kansas Supreme Court in *Seabourn v. Coronado Area Council, BSA*, 891 *P.*2d 385 (Kans. 1995), gave a narrow interpretation of "public accommodation" under the Kansas Act Against Discrimination. The court held that the BSA was entitled to reject plaintiff's application for an adult leadership position on the basis that he was a professed atheist. *Id.* at 391. The *Seabourn* court rejected an interpretation of public accommodations that divorced them from business establishments and contrasted the personal, private and on-going relationships fostered by scouting with the impersonal, economic and occasional interactions typical in business. *Id.* at 406.[2]

---

[2] Several California courts have considered the issue of whether the Boy Scouts constituted a "business establishment" subject to the Unruh Civil Rights Act. In *Yeaw v. Boy Scouts of America*, 64 *Cal. Rptr.*2d 85, 91-92 (Ct. App.), *review granted and opinion superseded*, 942 *P.*2d 415 (Cal. 1997), the court held that the BSA could exclude females because it was not a "business establishment" under the Unruh Act. In *Curran v. Mount Diablo Council of BSA (Curran II)*, 29 *Cal. Rptr.*2d 580 (Ct. App.), *review granted and opinion superseded*, 874 *P.*2d 901 (Cal. 1994), the court determined that forcing the BSA to accept a homosexual as a troop leader would violate the First Amendment. In *Randall v. Orange County Council, BSA*, 28 *Cal. Rptr.*2d 53 (Ct. App.), *review granted and opinion superseded* 874 *P.*2d 900 (Cal. 1994), the court upheld application of the Unruh Act to prevent exclusion from a cub scout pack of twin boys who denied a belief in God. The Supreme Court has "depublished" all three decisions while the cases are pending before it, thereby nullifying their precedential value. *See Cal. Rules of Court* 976, 977 and 979.

In contrast to the *Welsh* view, Connecticut has interpreted its state public accommodations statute as regulating "the discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public." *Quinnipiac Council, BSA v. Commission on Human Rights and Opportunities*, 528 *A.*2d 352, 357 (Conn. 1987). However, the Supreme Court of Connecticut declined to rest its holding on this issue. Rather, it held that the BSA did not violate Connecticut's public accommodations statute by refusing to permit a woman to serve as a scoutmaster because there was no denial of "access to its goods and services" and therefore the woman was not deprived of an "accommodation," as that word was used in the statute. *Id.* at 358.

We reject the narrow interpretation given by *Welsh* to "place of public accommodation." In defining the term we must be mindful that the LAD is remedial "and should be read with an approach sympathetic to its objectives." *National Org. for Women v. Little League Baseball, Inc.*, 127 *N.J. Super.* 522, 530 (App. Div.), *aff'd*, 67 *N.J.* 320 (1974). "[T]he overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimina-

tion.'" *Fuchilla v. Layman*, 109 *N.J.* 319, 334 (1988) (quoting *Jackson v. Concord Co.*, 54 *N.J.* 113, 124 (1969)). Its provisions must be construed liberally to effectuate that purpose. *N.J.S.A.* 10:5-3 ("[t]he Legislature intends . . . that this act shall be liberally construed in combination with other protections available under the laws of this State"). The LAD should be (and has consistently been) construed broadly and "'with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.'" *Andersen v. Exxon Co.*, 89 *N.J.* 483, 495 (1982) (quoting *Passaic Daily News v. Blair*, 63 *N.J.* 474, 484 (1973)).

Applying *Welsh*'s view that Title II applies only to a "place" would frustrate our goal of eradicating "the cancer of discrimination" in New Jersey. To have the LAD's reach turn on the definition of "place" is irrational because "places do not discriminate; people who own and operate places do." *Welsh, supra*, 993 *F.*2d at 1282 (Cummings, C.J., dissenting). No one can seriously argue that those who operate from a fixed "place" are more apt to discriminate than those who meet at varying locales. *Ibid.* Moreover, such a reading indiscriminately targets those who have the financial wherewithal to own or operate a "place," and excludes those who do not.

Indeed, New Jersey has rejected the narrow view advanced by *Welsh*. In *Little League, supra*, 127 *N.J. Super.* at 531, we held that Little League Baseball, Inc., is a "place of public accommodation" subject to the LAD. In rejecting Little League's assertion that it was not a "place of public accommodation" because it had no "place" or "situs," Judge Conford for the court observed that the term was one "of convenience, not of limitation." *Ibid.* He added

> The "place" of public accommodation in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played. The statutory "accommodations, advantages, facilities and privileges" at the place of public accommodation, *N.J.S.A.* 10:5-12(f), is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.

[*Ibid.*]

In the *Little League* court's view, the dispositive factor making Little League a public accommodation was that its invitation was "open to children in the community at large, with no restriction (other than sex) whatever." *Ibid.*

Even before *Little League* was decided, our Supreme Court had held that facilities and activities "offered to and . . . dependent upon the broad-based participation of members of the general public" are the types of accommodation the Legislature intended to reach through the LAD. *Fraser v. Robin Dee Day Camp*, 44 *N.J.* 480, 488 (1965). In *Fraser*, the owner of a day camp advertised the availability of its facilities to children from two to fourteen years of age. *Id.* at 482-83. Plaintiff's application to enroll his children was rejected because he was "colored." *Id.* at 483. No evidence was adduced before the Division on Civil Rights that the children had not met the health, physical and emotional standards required by the day camp. *Id.* at 484.

The Supreme Court in *Fraser* rejected the day camp's argument that, since it was not one of the enumerated "places" under the act, it was excluded, noting that the statute began by stating that a place of public accommodation "shall include," a term of "enlargement and not of limitation." *Id.* at 485; *see also Zorba Contractors,*

Inc. v. Housing Auth. of Newark, 282 *N.J. Super.* 430, 434 (App. Div. 1995). The *Fraser* Court observed that the day camp had offered many accommodations in common with swimming pools, recreation and amusement parks, motion picture houses, theaters, gymnasiums and schools, "all of which are specifically enumerated" in the statute as places of public accommodation. 44 *N.J.* at 487. The day camp was therefore "the type of accommodation which the Legislature intended to reach." *Ibid.*

In *Clover Hill Swimming Club v. Goldsboro*, 47 *N.J.* 25, 33 (1966), the Supreme Court revisited the issue and found that a private swimming club was a public accommodation under New Jersey's anti-discrimination statute because of the club's advertising and its extending "an invitation to the public generally" to join. The Court observed that the decision to operate as a private club "should not be permitted to obscure the accommodation's non-private nature." *Id.* at 34. " 'No device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination.' " *Ibid.* (quoting *Jones v. Haridor Realty Corp.*, 37 *N.J.* 384, 396 (1962)); *see also Sellers v. Philip's Barber Shop*, 46 *N.J.* 340, 348 (1966) (a barber shop is a place of public accommodation because it caters to the public or by advertising or other form of invitation induces patronage generally). Similarly, in *Evans v. Ross*, 57 *N.J. Super.* 223, 231 (App. Div.), *certif. denied*, 31 *N.J.* 292 (1959), Judge Goldmann observed:

> [A]n establishment which caters to the public, and by advertising and other forms of invitation induces patronage generally, cannot refuse to deal with members of the public who have accepted the invitation, because of their race, creed, color, national origin or ancestry. The law is designed to insure

> that all citizens of this State shall have equal rights as members of the public and not be subjected to the embarrassment and humiliation of being invited to an establishment, only to find its doors barred to them. *Once a proprietor extends his invitation to the public he must treat all members of the public alike.*

[Emphasis added.]

We conclude that the BSA and its local councils are places of public accommodation. The BSA invites "the public at large," *Little League, supra*, 127 *N.J.* at 530, to join its ranks, and is "dependent upon the broad-based participation of members of the general public." *Fraser, supra*, 44 *N.J.* at 488. As of 1993, scouting had nearly 5,000,000 youth and adult members nationwide, and over 100,000 members in New Jersey alone. Plaintiff points out that nearly 90,000,000 boys and men have joined the scouting ranks since 1910. This is no doubt so because the BSA emphasizes open membership in order to maintain its vitality and to reach every aspect of society. Its publication "A Representative Membership" announces that:

> Our federal charter sets forth our obligation to serve boys. *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.* The National Council and Executive Board have always taken the position that *Scouting should be made available for all boys who meet entrance age requirements*

[Emphasis added.]

Moreover, the BSA engages in advertising and public promotion to encourage new membership. *Fraser, supra*, 44 *N.J.* at 488. Local councils run radio and television spots and conduct "school nights." The BSA has under-

taken national television campaigns, hired public relations firms and has produced magazine inserts in national magazines promoting the benefits of scouting. One BSA spokesman has explained "I think of scouting as a product and we've got to get the product into the hands of as many consumers as we can."

Citing *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 *F.*2d 468 (3d Cir. 1986), *reh'g denied*, 811 *F.*2d 247 (3d Cir.), *cert. dismissed*, 483 *U.S.* 1050, 108 *S.Ct.* 362, 97 *L.Ed.*2d 812 (1987), the BSA argues that it is not a place of public accommodation because its membership practices and policy do not "reflect an open and unrestricted invitation to the community at large to join" the organization. *Id.* at 476. The BSA points to the fact that it engages in "selectivity" in that membership "is restricted to those willing and able to understand and live by the Scout Oath and Scout Law."

Kiwanis Int'l involved a federal action between Kiwanis International and one of its local clubs, Kiwanis Ridgewood. Kiwanis International sought to revoke the local club's license to use the Kiwanis "marks" because the club had admitted a woman in violation of Kiwanis International bylaws. *Id.* at 470-71. The Third Circuit concluded that Kiwanis Ridgewood was not a place of public accommodation under New Jersey's LAD because of the selective criteria for membership in Kiwanis Ridgewood. *Id.* at 471. The evidence was that Kiwanis Ridgewood had only twenty-eight members. *Id.* at 475. Each new member had to be sponsored; sponsorship "acted as a primary screening mechanism in the maintenance of the quality of membership." *Ibid.* Moreover, the local club engaged in a selective, rather than large scale membership solicitation by sending invitations only to prospects already known by current members. *Ibid.* The court concluded:

> This evidence of membership practices and policy does not reflect an open and unrestricted invitation to the community at large to join Kiwanis Ridgewood. Rather, all the evidence points totally in the opposite direction. If the test of "place of public accommodation" is unselectivity, unrestrictedness, and open invitation, as *Little League* informs us that it is, it is evident Kiwanis Ridgewood's practices do not pass the test.

[*Id.* at 476.]

The BSA contends that membership in its organization is "no less selective than membership in a local Kiwanis club."

Kiwanis Int'l is clearly distinguishable. There the focus was on the attributes and membership criteria of a small local club. Here, plaintiff was expelled because of the BSA's enforcement of its national policy precluding avowed homosexuals from its membership. Thus, we focus on the membership criteria of the BSA as a national organization. The BSA's national membership criteria are clearly less restrictive than those applied by the local club in *Kiwanis Int'l.* The BSA's criteria, acceptance of the Scout Oath and adherence to its laws, are conditions not significantly different from the boys' willingness to abide by the standards of the Little League: requiring tryouts; demanding adherence to the rules of the game; and requiring the physical attributes and skills to play it. *See Little League, supra,* 127 *N.J.* at 530-31. Considering the undisputed invitation for membership in its literature to "all boys," we deem the BSA's "selectivity" criteria inconsequential.

The BSA adds that we should focus on the "even more restricted and selective" criteria for adult membership in deciding whether the BSA is a place of public accommodation. It points to the fact that troop committees weigh

prospective adult leaders according to various characteristics including: (1) high moral standards; (2) commitment to the ideals of scouting; (3) ability to relate to boys; (4) ability to keep a "cool head" under pressure; and (5) organizing ability.

We reject the suggestion that the BSA organization as a whole is not a place of public accommodation because more stringent membership criteria are applied to a single component of the organization, its adult members. Such a result is clearly inconsistent with the remedial purposes of the LAD. Acceptance of the argument would mean that the private clubs in *Clover Hill, supra,* 47 *N.J.* at 34 and *Fraser, supra,* 44 *N.J.* at 485, are not places of public accommodation because their member-counsellors or lifeguards are subject to more stringent, enhanced training criteria. An extension of defendants' argument would be that the BSA is not a place of public accommodation because of the demanding standards that must be met to become an Eagle Scout.

In any event, selectivity for membership is not necessarily dispositive. For example, colleges and universities are places of public accommodation, *see N.J.S.A.* 10:5-5(*l*), despite the rigorous admission requirements imposed by many. Moreover, the majority of New Jersey decisions do not embrace the notion, advanced by *Kiwanis Int'l* and the BSA here, that the litmus test in determining whether an organization is subject to the LAD is whether it employs selective membership criteria. For example, in *Frank v. Ivy Club,* 120 *N.J.* 73 (1990), *cert. denied,* 498 *U.S.* 1073, 111 *S.Ct.* 799, 112 *L.Ed.*2d 860 (1991), the issue was whether Princeton University's private eating clubs were "distinctly private" and thus exempt from the LAD. *Id.* at 102. Membership in certain eating clubs was by invitation only after the applicant submitted

to a "Bicker" process, involving interviews and a demanding selection process. *Id.* at 84-85. The Court concluded that the eating clubs were subject to the LAD notwithstanding these selective membership criteria because of the integral and "symbiotic relationship" between the eating club and the University, a place of public accommodation. *Id.* at 108. *See also Clover Hill, supra,* 47 *N.J.* at 31-32 (despite selectivity criteria employed by privately-owned swim club, the club was a place of public accommodation because it had extended an invitation to the public generally by advertisement or otherwise).

Other factors support the conclusion that the BSA is a place of public accommodation. The BSA offers accommodations which "have many attributes in common with [the places and activities enumerated under *N.J.S.A.* 10:5-5(*l*)] . . . which can be characterized either as educational or recreational in nature." *See Fraser, supra,* 44 *N.J.* at 487. The BSA seeks to establish in its members self-sufficiency, physical strength, cleanliness and healthiness through such outdoor activities as camping, biking and hiking. It also stresses educational topics such as democracy, civics, respect for the family and personal development.

Further, although the BSA may not have the type of integral and "symbiotic relationship" with a place of public accommodation, as existed in *Frank, supra,* 120 *N.J.* at 104, we cannot ignore the BSA's historic partnership with various public entities and public service organizations. Local BSA units are chartered by public schools, parent-teacher associations, firehouses, local civic associations, and the United States Army, Navy, Air Force and National Guard. The BSA's "learning for life" program has been installed in many public school classrooms throughout the country. Many troops meet in public

facilities. These relationships benefit the BSA. The BSA in turn provides essential services through its scouts to the public and quasi-public organizations. This close relationship underscores the BSA's fundamental public character.

For the foregoing reasons, we conclude that the BSA is a place of public accommodation under the LAD.

II

For the reasons above-expressed, we reject summarily the trial judge's conclusion that defendants qualified for the LAD exclusion in *N.J.S.A.* 10:5-5(*l*) for any "institution . . . which is in its nature distinctly private[.]" The characterization of "distinctly private" has been interpreted to represent merely "the other side of the 'public accommodation' coin." *Kiwanis Int'l, supra,* 806 *F.*2d at 476. *Accord Brounstein v. American Cat Fanciers Ass'n,* 839 *F.Supp.* 1100, 1107 (D.N.J. 1993). Because we conclude that the BSA is a place of public accommodation, it cannot be characterized as "distinctly private."

We also find unpersuasive defendants' alternative argument that they are exempt from the LAD because they qualify as an "educational facility operated or maintained by a bona fide religious or sectarian institution." *N.J.S.A.* 10:5-5(*l*). The BSA is expressly nonsectarian. Even if its requirement that members profess a belief in God were sufficient to render it a bona fide religious or sectarian institution, it does not qualify as an "educational facility." It also does not fall within the exception in the LAD respecting "the right of a natural parent or one *in loco parentis* to direct the education and upbringing of a child under his control." *Ibid.* The BSA's temporary charge of young members does not place it in loco parentis. The status in loco parentis derives from the intent to assume

the parental relationship. *A.S. v. B.S.,* 139 *N.J. Super.* 366, 369 (Ch. Div. 1976), *aff'd,* 150 *N.J. Super.* 122 (App. Div. 1977). Scouting, no matter how significant a role it may play in a boy's development, does not purport to take the place of parents.

III

The trial judge also found that plaintiff was not denied accommodations, advantages, facilities or privileges under *N.J.S.A.* 10:5-12f. He reasoned that plaintiff suffered "no legally remedial adverse consequences . . . from his termination" and "lost nothing of compensable value," since he was merely a volunteer assistant scoutmaster. We disagree. Clearly, the opportunity to serve as a volunteer must be construed as a privilege within the meaning of the LAD, whether despite, or because of, the duties attached. *See Brounstein, supra,* 839 *F.Supp.* at 1108 (designation of cat show judge was privilege or advantage offered by association to certain of its members, and therefore a privilege under the LAD).

Quinnipiac Council, BSA, supra, 528 *A.*2d at 360, relied on by defendants, is distinguishable. There, the Connecticut Supreme Court held that a local boy scout council did not violate the state public accommodation statute by refusing to permit a woman to serve as a scoutmaster. This was so, the Court held, because Connecticut's public accommodation statute guarantees "access to its goods and services," but not the opportunity to offer services. *Id.* at 358. In contrast, the LAD prohibits denial of "accommodations, advantages, facilities or privileges." *N.J.S.A.* 10:12-5f. Defendants do not argue persuasively that serving as an assistant scoutmaster does not constitute an advantage or privilege.

IV

Plaintiff's count in his complaint that he is protected by the common law right not to be expelled from membership on grounds contrary to public policy is duplicative of the LAD claim, and consequently must be dismissed.

"It is well-settled that courts will invalidate an expulsion from a private organization when the expulsion is based on reasons that violate public policy." *Rutledge v. Gulian*, 93 *N.J.* 113, 119 (1983). The basis for relief from wrongful expulsion is the member's valuable personal relationship to the organization. *Id.* at 118. However, where the plaintiff was entitled to bring a similar claim under the LAD, it is unnecessary to consider whether a common law action would have been possible. *Catalane v. Gilian Instrument Corp.*, 271 *N.J. Super.* 476, 491 (App. Div.), *certif. denied*, 136 *N.J.* 298 (1994).

Plaintiff is correct that his BSA membership conferred the kind of status that merits judicial protection. However, he nevertheless fails to establish that, either at the time of his expulsion or at present, the public policy of New Jersey required greater regulation of discrimination within membership organizations than that required by the LAD. New Jersey's public policy against discrimination based on affectional or sexual orientation is now codified in the LAD. *See Brounstein, supra*, 839 *F.Supp.* at 1111 (public policy against discrimination based on religion made explicit in LAD). We have held that "supplementary common law causes of action may not go to the jury when a statutory remedy under the LAD exists." *Catalane, supra*, 271 *N.J. Super.* at 492.

The LAD does not "bar, exclude or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful

discrimination." *N.J.S.A.* 10:5-27. Nor does the LAD preclude other remedies. "All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by this act or any other statute." *N.J.S.A.* 10:5-13. The Legislature declared:

> Such harms [those suffered because of discrimination] have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State

[*N.J.S.A.* 10:5-3.]

This passage has been interpreted to express a legislative intent to read the LAD to encompass all those claims and damages previously available at common law, rendering unnecessary a separate common law claim for discrimination in employment. *Catalane, supra*, 271 *N.J. Super.* at 492. *Accord DeJoy v. Comcast Cable Communications, Inc.*, 941 *F.Supp.* 468, 475-76 (D.N.J. 1996). There is no reason not to apply the same rule to claims for discrimination by places of public accommodation.

Prior cases support the principle that where a separate claim for relief is based on the same discrimination allegations underlying the LAD claim, and the court determines that the LAD was not violated, no additional consideration is needed. *Erickson v. Marsh & McLennan Co., Inc.*, 117 *N.J.* 539, 561 (1990). Also, if the LAD creates a remedy, it may be unnecessary to recognize or create a common law action to vindicate substantially the same rights and provide similar relief. *Shaner v. Horizon Bancorp*, 116 *N.J.* 433, 454 (1989).

In contrast, in some circumstances a plaintiff could pursue an independent action "to vindicate particular interests in addition to or aside from those sought to be protected by a LAD action." *Ibid.* Plaintiff does not demonstrate that a common law cause of action would vindicate any additional interests. He provides no support for a theory that the common law would go farther than the LAD in forbidding discrimination based on affectional or sexual orientation within private organizations as well as places of public accommodation. He argues instead merely that a parallel common law claim should have been permitted. We disagree.

V

The trial judge, as an alternative basis for dismissing plaintiff's complaint, held that the First Amendment freedom of association sheltered defendants from the LAD's reach. The judge accepted defendants' assertion that the BSA's fundamental right of freedom of expression permits it to exclude avowed homosexuals who represent and espouse values that are antithetical to boy scout teachings and activities. Defendants' argument, accepted by the trial judge, is that its mission to instill the values of the Scout Oath and Scout Law in boys who join the boy scout troops would be undermined if the state intrudes into its internal affairs by forcing it to accept homosexual members. This contention is predicated on the BSA's policy of excluding avowed homosexuals because homosexuality conflicts with the Scout Oath, demanding that the scout be "morally straight," and the Scout Law, requiring scouts to be "clean."

The trial judge endorsed this view. He stated:

> It is abundantly clear from the proofs presented by BSA that from its inception Scouting has excluded from membership and adult leadership any person who openly declares himself a homosexual and that such policy has continued unchanged, to the present. Such policy applies, a fortiori, to one who engages in homosexual conduct. It is the firm position of BSA that such conduct is not "morally straight" under the Scout Oath nor is it "clean" under the Scout Law

The judge thereupon gave the generally-recognized definitions of "sodomy" and "buggery," and cited the Judeo-Christian tradition condemning sodomy as a "gravely serious moral wrong." The judge also noted that sodomy in New Jersey was a crime until 1979. He concluded:

> To suggest that the BSA had no policy against active homosexuality is nonsense. It was an organization which from its inception had a God-acknowledged, moral foundation. It required its members, youth and adult, to take the Scout Oath that they would be "morally straight." It is unthinkable that in a society where there was universal governmental condemnation of the act of sodomy as a crime, that the BSA could or would tolerate active homosexuality if discovered in any of its members. . . .
>
> According to its mission and purpose, BSA has determined that an assistant scoutmaster who is an active sodomist is simply incompatible with scouting and is not "morally straight." Does the NJLAD require a fundamental, court-imposed, change in its policies? The short answer is No.

The federal constitution does not expressly recognize the right to freedom of association. However, the right may be inferred from other rights and protections guaranteed by the constitution. Freedom of association was first recognized in 1958 in *NAACP v. Alabama*, 357 *U.S.*

449, 460, 78 *S.Ct.* 1163, —, 2 *L.Ed.*2d 1488, 1498 (1958), where the Supreme Court observed that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedoms of speech and assembly." *Ibid.* It is therefore "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Ibid.*

Early freedom of association cases involved civil rights groups. *See ibid*; and *see* Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Anti-Discrimination Laws to Quasi-Public Clubs*, 2 *Mich. J. Gender & Law*, 27, 57 (1994). Later, unpopular political groups asserted the protection to shield themselves from election laws regulating financial disclosure. *Ibid*; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 *U.S.* 87, 89, 103 *S.Ct.* 416, —, 74 *L.Ed.*2d 250, 254 (1982); *Buckley v. Valeo*, 424 *U.S.* 1, 74, 96 *S.Ct.* 612, —, 46 *L.Ed.*2d 659, 719 (1976). The early cases did not involve state attempts to bar discrimination under public accommodation.

In *Roberts v. United States Jaycees*, 468 *U.S.* 609, 104 *S.Ct.* 3244, 82 *L.Ed.*2d 462 (1984), the United States Supreme Court provided a framework for analyzing constitutional claims of freedom of association in the context of protection against application of a state's public accommodation law. The Court cited cases affording constitutional protection to freedom of association in two distinct senses: freedom of intimate association, and freedom of expressive association. *Id.* at 617-18, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 471.

Freedom of intimate association shields against unjust government intrusion into individual's choice to maintain intimate or private associations with others. *Id.* at 618-19, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 471-72. The intimate relationship accorded this constitutional protection includes such relationships as marriage, child bearing, education and cohabitation with relatives. *Id.* at 619-20, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 472. The protection applies only to those groups having such attributes as "relative smallness," a high degree of selectivity in decision making, and seclusion from others. *Id.* at 620, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 472.

Freedom of intimate association is not implicated here. The BSA consists of nearly 5,000,000 members. It is open to all boys. The BSA engages in aggressive advertising and undertakes a variety of special interest activities in schools and other public forums. Thus, the BSA lacks the distinctive qualities that might afford constitutional protections under this component of the First Amendment.

Freedom of expressive association is a correlative right to an individual's freedom to speak. *Id.* at 622, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 474. Implicit in the "right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Ibid.* Generally speaking, "[o]vertly political organizations [or organizations formed to advance gender or race based interests] are the ones most likely to demonstrate successfully a genuine relationship between their discriminatory practices and their objectives." Frank, *supra*, at 59-60. Justice Brennan, for the *Roberts* Court, observed:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than

> a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Roberts, supra, 468 *U.S.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 474-75.]

The Court cautioned, however, that:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

[*Id.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475.]

Applying this framework, the Supreme Court in *Roberts* held that Minnesota's public accommodations law, by requiring the admission of women to the Jaycees, did not unconstitutionally infringe upon the male members' freedom of expressive association. *Id.* at 628-29, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 478. The Court found no basis for concluding that the law would require any change in the organization's creed, or impose any restrictions on its "ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.* at 627, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 477. *See generally,* Eunice A. Eichelburger, Annotation *Civil Rights Laws Prohibiting Organization's Membership Restrictions as Violating Organization's or its Members' Rights of Association Under Federal Constitution's First Amendment,* 82 *L.Ed.*2d 1040 (1986) (collecting cases).

Three years later, the United States Supreme Court applied the *Roberts* analytical framework in holding that California's Unruh Act did not violate the First Amendment right of expressive association by requiring a Rotary Club to admit women, where the members' ability to carry out their purposes would not be affected "in any significant way." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 *U.S.* 537, 548, 107 *S.Ct.* 1940, —, 95 *L.Ed.*2d 474, 486-87 (1987). The Court observed that Rotary Clubs do not take positions on political issues and, although they "engage in a variety of commendable service activities that are protected by the First Amendment," the Unruh Act "does not require the clubs to abandon or alter any of these activities." *Id.* at 548, 107 *S.Ct.* at —, 95 *L.Ed.*2d at 486. The Court added:

> Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.

[*Id.* at 549, 107 *S.Ct.* at —, 95 *L.Ed.*2d at 486.]

One year later, the Court rejected a challenge to the facial validity of a New York City law forbidding discrimination by certain clubs with more than 400 members, finding that it did not infringe on the members' private associational rights in any significant way. *New York State Club Ass'n, Inc. v. City of New York,* 487 *U.S.* 1, 13, 108 *S.Ct.* 2225, —, 101 *L.Ed.*2d 1, 16 (1988). The law did not require the clubs "to abandon or alter" any activities protected by the First Amendment, because, as long as prohibited categories were not used as shorthand identification of rejected individuals, the law did not prevent exclusion of individuals who did not share the

views the members wished to promote. *Ibid.* The Court added a caveat, however:

> It is conceivable, of course, that an association might be able to show that *it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.*

[*Ibid,* (emphasis added).]

What emerges from this trilogy of cases is a recognition of the tension between the freedom to associate for the purpose of expressing fundamental views and the compelling state interest in eradicating discrimination. *Roberts, supra,* 468 *U.S.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475. Conciliation of these competing forces is achieved if the state's enforcement of its anti-discrimination law is unrelated to the suppression of ideas and will not "affect in any significant way the existing members' ability to carry out their various purposes." *Board of Dir. of Rotary Int'l, supra,* 481 *U.S.* at 548, 107 *S.Ct.* at —, 95 *L.Ed.*2d at 486. Thus, the organization or club asserting the freedom has a substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory practice. Any lesser showing invites scuttling of the state's anti-discrimination laws based on pretextual expressive claims. *See* Frank, *supra,* at 63.

By enacting the LAD, the Legislature declared that the practices of discrimination are a matter of concern to the government and that "such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." *N.J.S.A.* 10:5-3. The Legislature recognized that because of discrimination, "people

suffer personal hardships, and the State suffers a grievous harm." *Ibid.* New Jersey prides itself on being in "the vanguard in the fight to eradicate . . . unlawful discrimination of all types . . ." *Peper v. Princeton Univ. Board of Trustees,* 77 *N.J.* 55, 80 (1978). Thus, the "overarching goal of the [LAD] is nothing less than the eradication" of discrimination. *Fuchilla, supra,* 109 *N.J.* 334.

By amendment to *N.J.S.A.* 10:5-4 in 1991 (*L.*1991, c. 519, § 2), the Legislature expanded the categories of persons protected to include discrimination based on "affectional or sexual orientation." This was an implicit recognition that discrimination based on "archaic" and "stereotypical notions" about homosexuals that bears no relationship to reality cannot be countenanced. *Roberts, supra,* 468 *U.S.* at 625, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 476. It is also a recognition that the "stigmatizing injury" and denial of equal opportunities that accompanies it is felt no less strongly by this protected group than others who suffer personal hardship because of discriminatory practice. *Ibid.*

VI

Will New Jersey's compelling interest in eradicating discrimination by enforcement of the LAD significantly impair the BSA's ability to express its fundamental tenets and to carry out its social, educational and civic activities? For purposes of discussion, we accept the proposition that such goals and activities are protected by the First Amendment freedom of expressive association. *See id.* at 622, 104 *S.Ct.* —, 82 *L.Ed.*2d at 474.

We start with the undisputed fact that BSA's collective "expressive purpose" is not to condemn homosexuality. Its reason to be is not to provide a public forum for its members to espouse the benefits of heterosexuality and the "evils" of the homosexual lifestyle. As plaintiff convinc-

ingly observes, "[b]oys are not urged to join Scouting to learn the 'evils' of being gay, nor are adult leaders recruited to advance some anti-gay agenda." Motivation to advance such anti-gay views was not what "brought [the original members] together." *Id.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475.

Rather, a definition of the BSA's mission, purposes and fundamental beliefs is found in its Congressional Charter, bylaws, rules and regulations, and handbooks. The BSA was chartered by Congress with a stated purpose "to promote . . . the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues. . . ." To achieve these goals, the BSA's bylaws provide that emphasis shall be placed upon its "educational program and the oaths, promises and codes of the Scouting program for character development, citizenship training, mental and physical fitness." The BSA's mission is to "serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." To that end, the BSA trains and educates boys in camping and other outdoor activities, democracy, civics, respect for the family, personal strength and development, self-sufficiency and sexual responsibility. True to the Scout Oath and Scout Law, adult scout leaders endeavor to impart in the scouts the traditional values of trustworthiness, honesty, independence, physical and moral courage, commitment, cleanliness and fidelity.

We conclude that enforcement of the LAD by granting plaintiff access to the accommodations afforded by scouting will not affect in "any significant way" BSA's ability to express these views and to carry out these activities. On its face, the LAD "does not aim at the suppression of speech nor does it distinguish between prohibited and permitted activity on the basis of viewpoint . . . ." *Id.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475. As applied to the facts before us, it cannot convincingly be argued that the LAD's proscription against discrimination based on "affectional or sexual orientation" impedes the BSA's ability to express its collective views on scouting, or to instill in the scouts those qualities of leadership, courage and integrity to which the BSA has traditionally adhered. The LAD does not in any manner require the BSA to abandon or alter any of its laudable activities and programs. The focal point of its prohibition is the act of discrimination against individuals respecting access to public accommodations. Its application here leaves in place the integral workings of the BSA and its constitutional right to carry out its mission.

Indeed, the goals of the BSA are in many respects compatible with the purposes sought to be achieved by the LAD. Its Congressional Charter states that the BSA's bylaws and rules shall not be "inconsistent with the law of the United States of America, or any State thereof . . . ." 36 *U.S.C.A.* § 22. Such "laws," of course, include anti-discrimination laws. The BSA's publications stress that neither its federal charter nor its bylaws "permits the exclusion of any boy." Consequently, the BSA has a long-term commitment "to a membership that is representative of all economic and racial groups," and encourages its local councils to establish membership that is "representative of *the total population* of the council or district." (Emphasis added). This commendable quality of inclusion is not at all inconsistent with the purposes of New Jersey's anti-discrimination law.

We reject as irrelevant the trial judge's conclusion that "[a]ccording to its mission and purposes, BSA has determined that an assistant scoutmaster who is an active sodomist is simply incompatible with scouting and is not morally straight." The question here is whether the BSA

discriminated against plaintiff because of his "affectional or sexual orientation." The BSA excluded plaintiff because he was an avowed homosexual, not because he was an "active sodomist." The observation also raises, no doubt inadvertently, the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts, or will instill in them ideas about the homosexual lifestyle. "The prevalence of homophobia and stereotypical conceptions of homosexuality within society as a whole, and within the legal system in particular, have been well documented." Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation & Dissemination Efforts*, 41 *Wayne L. Rev.* 1, 37 (1994). *Accord* Frank, *supra*, at 27 n.60; David P. Russman, *Alternative Families: In Whose Best Interests?*, 27 *Suffolk U. L. Rev.* 31, 58-59 (1993); Darryl Robin Wishard, *Out of the Closet & Into the Courts: Homosexual Fathers & Child Custody*, 93 *Dick. L. Rev.* 401, 406 (1989). *Roberts* cautions that, in examining an association's freedom of expressive association claim, "legal decision making that relies uncritically on such [unproven] assumptions" must be condemned. 468 *U.S.* at 628, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 478. Such assumptions, predicated on stereotypical generalizations, rather than fact, cannot be employed as "shorthand measures" in place of legitimate factors justifying First Amendment protection. *New York State Club Ass'n, Inc., supra*, 487 *U.S.* at 13, 108 *S.Ct.* at —, 101 *L.Ed.*2d at 16.

There is absolutely no evidence before us, empirical or otherwise, supporting a conclusion that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to properly care for, or to impart BSA humanitarian ideals to the young boys in

his charge. Nothing before us even suggests that a male, simply because he is gay, will somehow undermine BSA's fundamental beliefs and teachings. Plaintiff's exemplary journey through the BSA ranks is testament enough that these stereotypical notions about homosexuals must be rejected.

Nevertheless, defendants appear to focus on plaintiff's statements as a "gay activist." They claim that his "message," his avowed homosexuality, is "at odds" with scouting's expressive purposes set forth in the Scout Oath and Scout Law. Defendants reason that plaintiff "could hardly be an effective role model for Scouting's morally straight value when he 'stands up' for a view of morality which is inconsistent with that value."

The Boy Scout Oath requires a boy scout to be "morally straight." To be morally straight, one must be:

> of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

The Scout Law requires a scout to be "clean," that is, a scout "keeps his body and mind fit and clean. He chooses the company of those who live by the same ideals. He helps keep his home and community clean." Defendants argue that "morally straight" and "clean" are collective "expressive" ideals of the BSA which will be compromised if avowed homosexuals are admitted as scout leaders.[3]

---

[3] The only reference to homosexuality we could find in the voluminous record is in the Scoutmaster's Handbook. The scout-

This focus on "morally straight" and "clean" as a basis for excluding avowed homosexual scoutmasters is only of recent vintage. The first reference to homosexuals is found in a March 17, 1978 "memorandum" to the BSA's exclusive executive council from its Chief Scout Executive. It states that a "declare[d]" homosexual may not be a volunteer scoutmaster because "the [BSA] is a private, membership organization and [participation in the program] is a privilege and not a right." Significantly, the reason cited for the exclusion is the BSA's view that it is a "private" organization, not because homosexuals cannot be "morally straight" or "clean."

Plaintiff was expelled from the BSA on July 19, 1990. In the BSA's expulsion letter, the BSA explains that plaintiff "should understand that BSA membership registration is a privilege" and "is not automatically granted to everyone who applies." No reference is made to the "morally straight" or "clean" criteria under the Scout Oath or Scout Law.

On June 6, 1991, eleven months after plaintiff's expulsion, the BSA issued a "Position Statement" which, for the first time declares:

> We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout

---

master is directed that he should not instruct scouts in the subjects of sex and family life because such subjects are not within "Scouting's proper area" and that scoutmasters are not qualified to address the subjects. The handbook directs that if a scoutmaster is confronted with homosexual activity between two boy scouts, the scoutmaster must distinguish between "youthful acts of innocence, and the practices of a confirmed homosexual who may be using his Scouting association to make contacts." The scoutmaster is instructed to "keep quiet" about these instances and to refer the offending boy scout to appropriate counselling programs. Notably, this directive refers to homosexual boy scouts, not scout leaders.

> be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.
>
> Because of these beliefs, the Boy Scouts of America does not accept homosexuals as members or as leaders, whether in volunteer or professional capacities.
>
> Our position on this issue is based solely upon our desire to provide the apropriate environment and role models which reflect Scouting's values and beliefs.

That "Position Statement" was repeated from time to time until January 1993, when the BSA refined it, stating:

> The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.
>
> We do not believe that homosexuals provide a role model consistent with these expectations.
>
> Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

We cannot accept the proposition that this "Position Statement," issued for the first time seventy-six years after Congress granted the BSA its Charter, represents a collective "expression" of ideals and beliefs that brought the boy scouts together. Coincidentally, these 1991 and 1993 "Position Statements" were expressed by the BSA during a time when their anti-gay policy was subject to judicial challenge in California. *See Curran, supra,* 29 *Cal. Rptr.* 2d at 583-85. The First Amendment freedom of expressive association issue was squarely before the *Curran* Court. *Ibid.* It is therefore not unrealistic to view these "Position Statements" as a litigation stance taken by the

BSA rather than an expression of a fundamental belief concerning its purposes.

In any event, aside from the undebatable fact that this so-called "position" was not even set forth in a written document when plaintiff was expelled, it is undisputed that such policy has not been incorporated into the BSA's bylaws, rules, regulations and handbooks. It was not contained in plaintiff's application for the adult scoutmaster position. As far as we can determine from the record, the "Position Statement" has not been disseminated throughout the BSA hierarchy and, except during litigation, has not been presented to the public as representative of BSA's official position. Indeed, the appendix is rife with affidavits from past and present boy scouts and adult leaders stating that during their tenure they had no knowledge that such a policy even existed.

Moreover, this "Position Statement" hardly squares with the view shared by a substantial percentage of church groups who sponsor local boy scout troops. For example, retired Bishop Melvin Wheatly, Jr., of the United Methodist Church, states in his certification:

> The United Methodist Church has a particularly strong relationship with and commitment to Boy Scouts of America ("BSA") and the values represented by BSA. BSA is an organization which fosters values such as honesty, loyalty, reverence, integrity and commitment in boys and young men. It is because of these values that The United Methodist Church has been the largest single supporter of BSA nationally, sponsoring more than 200 BSA troops in New Jersey alone. BSA's discrimination against homosexuals, however, is inconsistent with the clearly expressed condemnation by The United Methodist Church of discrimination on the basis of

> sexual orientation and has no apparent relation to the values that form the basis of The United Methodist Church's commitment to BSA.
>
> BSA's discrimination against homosexuals offends the human dignity of such persons. The United Methodist Church has been very clear in condemning discrimination on the basis of sexual orientation.

Further, the Union of American Hebrew Congregations, representing 900 congregations and over 1,500,000 reformed Jews, has called upon the BSA to "open its membership and leadership to all . . . men and boys without regard to the sexual orientation." Other religious groups, including the organizations joined as *amici*, many of whom sponsor boy scout troops, have publicly declared their opposition to the BSA's anti-gay position. Some of the groups in fact petitioned the New Jersey Legislature to amend the LAD to prohibit discrimination based on "affectional or sexual orientation." Finally, the record contains certifications from many boy scout leaders recording their efforts to change the Executive Board's policy on gays.

What is clear is that the BSA's preemptive exclusion of avowed homosexuals is employed without regard for the diverse ideological differences among the religious institutions and other groups who support the BSA's ideals and activities. As plaintiff and *amici* persuasively argue, the BSA has not attempted to exclude these religious institutions on the basis that the institutions have condemned the anti-gay policy. Nor has it moved in a wholesale manner to expel heterosexual scouts who have condemned the practice. In contrast, a gay scout leader who says absolutely nothing about the morality or lifestyle of homosexuals is subject to expulsion if he discloses his sexual orientation. These facts belie the BSA's argument that its

collective purpose is to "exclude individuals who do not share the views that the club's members wished to promote." *New York State Club Ass'n, Inc., supra,* 487 *U.S.* at 13, 108 *S.Ct.* at —, 101 *L.Ed.*2d at 16. The facts diminish the BSA's assertion that its policy excluding avowed gays was a collective view that "brought [its members] together." *Roberts, supra,* 468 *U.S.* at 623, 104 *S.Ct. at* —, 82 *L.Ed.*2d at 475.

Defendants argue that because plaintiff's "manifest" views as an avowed homosexual are "at odds" with positions taken by the BSA, plaintiff may be excluded from membership under the United States Supreme Court's holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 *U.S.* 557, 115 *S.Ct.* 2338, 132 *L.Ed.*2d 487 (1995).

In *Hurley,* the South Boston Allied War Veterans Council (Council) was authorized by the City of Boston to organize and conduct the St. Patrick's Day—Evacuation Day parade. *Id.* at 560, 115 *S.Ct.* at 2341, 132 *L.Ed.*2d at 495. The Council refused a place in the 1993 parade to GLIB, an Irish-American gay group joined together for the sole purpose of marching in the parade as a way to express its members' pride in their Irish heritage as openly gay, lesbian and bisexual individuals. *Id.* at 561, 115 *S.Ct.* at 2341, 132 *L.Ed.*2d at 496. The state court admitted GLIB into the parade, holding that a parade was a public accommodation under Massachusetts law, and that mandating inclusion of GLIB did not infringe upon the Council's right of expressive association. *Id.* at 562-63, 115 *S.Ct.* at 2341-42, 132 *L.Ed.*2d at 496-97.

In reversing, the United States Supreme Court focused on the Council's First Amendment freedom of speech,

of its freedom of expressive association. Defining parades as "public dramas of social relations," *id.* at 568, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 500, the Court determined that "[t]he protected expression that inheres in a parade is not limited to its banners and songs," but extends to its communicated symbolism as well. *Id.* at 569, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 500-01.

The South Boston parade involved people marching in costumes and uniforms, carrying flags and banners with all sorts of messages (*e.g.,* "England get out of Ireland," "Say no to drugs"), with marching bands, pipers and floats. *Id.* at 569, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 501. The Court rejected the notion that a private speaker forfeits his constitutional freedom of expression protection "simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 501. The Court compared the Council's role in assembling and administrating the parade with a newspaper's edited compilation of other people's speech on its editorial page, a constitutionally protected activity. *Id.* at 570, 115 *S.Ct.* at 2346, 132 *L.Ed.*2d at 501.

The Court found that the Massachusetts public accommodations law had been "applied in a peculiar way" in that its enforcement did not address the fact that the Council had not excluded homosexuals as such; they could participate in the parade as a member of any group that the Council had approved to march. *Id.* at 572, 115 *S.Ct.* at 2347, 132 *L.Ed.*2d at 503. Despite this fact, GLIB demanded that it march in the parade as a single unit "carrying its own banner." *Ibid.*

The Court held that the Massachusetts courts' application of the public accommodation law "produced an order

essentially requiring [the Council] to alter the expressive content of [its] parade." *Id.* at 572-73, 115 *S.Ct.* at 2347, 132 *L.Ed.*2d at 503. By making the Council's "speech" itself to be the public accommodation, "any contingent of protected indviduals with a message would have the right to participate in [the Council's] speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.* at 573, 115 *S.Ct.* at 2347, 132 *L.Ed.*2d at 503. This use of the state's power "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Ibid.* This freedom involves not only the choice of what is to be said, but what is to be left unsaid. *Ibid.* Thus, whatever the reason the Council had in excluding GLIB, "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575, 115 *S.Ct.* at 2348, 132 *L.Ed.*2d at 504.

The Court concluded:

> When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

[*Id.* at 578, 115 *S.Ct.* at 2350, 132 *L.Ed.*2d at 507.]

Applying *Hurley*, defendants argue that plaintiff's affirmation of his homosexuality is "expressive activity"

which presents the same "potential for a clash of views as the gay, lesbian and bisexual contingent which sought to march in Boston's St. Patrick's Day—Evacuation Day Parade."

As noted, *Hurley* is a First Amendment speech case. It involves "the choice of a speaker [the Council] not to propound a particular point of view" in its South Boston parade which communicated diverse and ethnic social messages. *Id.* at 574-75, 115 *S.Ct.* at 2348, 132 *L.Ed.*2d at 504. In other words, the Court was protecting a form of pure speech, the collective expressive views of the parade itself. Significantly, the Court did not undertake a freedom of expressive association analysis under the *Roberts* trilogy of cases. This was so no doubt because of the Court's "initial recogniton in its analysis that the Parade itself constituted expression." Kristine M. Zaleskas, *Pride, Prejudice or Political Correctness? An Analysis of Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 29 *Colum. J.L. & Soc. Probs.* 507, 547 (1996).

In *Roberts*, and the other freedom of expressive association cases, the Court was called upon to decide whether or not the public accommodations statutes would require the organization to "alter substantially its activities." *Zaleskas, supra*, at 547. Consequently, the Court's focus was on those activities, not the content of any speech associated with those activities. *Id.* at 548. Indeed, *Hurley* appears to preserve the holding and analysis of the *Roberts* trilogy of cases, noting that in those cases, by compelling access to the benefits afforded by the activity of the organizations, the state had not trespassed on the organizations' message itself. *Hurley, supra*, 515 *U.S.* at 580, 115 *S.Ct.* at 2351, 132 *L.Ed.*2d at 508. In *dictum*, the *Hurley* Court observed parenthetically that GLIB would still lose, applying the *Roberts* analysis, be-

cause it could be "refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81, 115 *S.Ct.* at 2351, 132 *L.Ed.*2d at 508.

In our view, *Hurley* is not dispositive here. In *Hurley*, both the Council's parade (reflecting diverse ethnic and social values) and GLIB's desire to participate (to express as a unit its pride in its members' Irish heritage and homosexuality) were expressive activities. As plaintiff observes, both the parade and GLIB's participation were pure forms of speech. To enforce inclusion of GLIB's message in the parade had the effect of altering the expressive context of the speaker's (the Council's) purpose in conducting the parade. Unlike a parade, where the "marchers . . . are making some sort of collective point," *id.* at 568, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 500, the BSA is a national organization focusing its energy and resources on activities aimed at the physical, moral and spiritual development of boys and young men. The public accommodation law implicated here simply demands access to those activities; it does not attempt, directly or indirectly, to hamper the BSA's ability to carry out these activities or express its views respecting their benefits.

Also, plaintiff is not asserting a right under the LAD to alter the content of the BSA's viewpoint. He merely seeks access to a public accommodation, participation in boy scout activities. His public acknowledgment that he is a homosexual is hardly comparable to a banner in a parade declaring his pride in his homosexuality.

Finally, we cannot accept the proposition that plaintiff's public declaration that he is gay in and of itself

constitutes "expressive activity" sufficient to forfeit his entitlement to membership in the BSA. The BSA's argument that this "message" given by plaintiff's declaration conflicts with the BSA "morally straight" and "clean" policies falters, when one considers other scout laws to which scouts promise to subscribe. The scout promises to be "trustworthy," that is, to tell the truth. "Honesty is part of his code of conduct. People can depend always on him." A scout also promises to be "brave," that is, to have the courage "to stand for what he thinks is right even if others laugh at him or threaten him." In our view, there is a patent inconsistency in the notion that a gay scout leader who keeps his "secret" hidden may remain in scouting and the one who adheres to the scout laws by being honest and courageous enough to declare his homosexuality publicly must be expelled. We also cannot accept the proposition that the BSA has a constitutional privilege of excluding a gay person when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself.

The dismissal of plaintiff's common law claims is affirmed. Otherwise, the summary judgment order is reversed, and the matter is remanded for further proceedings.

LANDAU, J.A.D. (concurring and dissenting)

It is unlikely, in my view, that the New Jersey Legislature originally intended that private groups, large or small, would be deemed to be "places" of public accommodation, akin to hotels, stores, restaurants, theaters and the like, whose discriminatory conduct troubled our collective conscience when the LAD was enacted in 1945. Use of the words "other real property" in *N.J.S.A.* 10:5-4 in the phrase "place of public accommodation, publicly assisted housing accommodation, and other real property" would incline me to a property-based interpretation, were this truly a matter of first impression. *See also N.J.S.A.* 10:1-5; 10:5-5(*l*).

I am persuaded, nonetheless, partly by the enduring, legislatively undiluted, vitality of the *Little League* [1] opinion in this State, and partly by the authorities cited in the majority's carefully crafted opinion, that notwithstanding authority to the contrary, *see, e.g., Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267 (7th Cir.), *cert. denied*, 510 *U.S.* 1012, 114 *S.Ct.* 602, 126 *L.Ed.*2d 567 (1993), judicial interpretation has generally transformed organizations which extend an open invitation to public membership as broad as that of the Boy Scouts into places of public accommodation for purposes of statutes such as the LAD.

What has been lost in the majority's opinion is our traditional focus upon the special facts of the case on appeal. James Dale, who excelled as a Boy Scout, has been prominently publicized as an avowed, practicing homosexual and also as a leader in organizational activities given to the promotion of the interests of gay and

---

1 *National Org. for Women, Essex County Chapter v. Little League Baseball, Inc.*, 127 *N.J. Super.* 522 (App. Div.), *aff'd*, 67 *N.J.* 320 (1974).

lesbian students. He wants to continue his scouting career in a leadership capacity as a volunteer scoutmaster or assistant scoutmaster.

Concerned that accepting an avowed homosexual as a scoutmaster would signify endorsement of such a lifestyle in contradiction to their declared policies against extramarital sex and homosexual activity, the Boy Scouts went beyond refusing Dale a volunteer leadership post. They also revoked his Boy Scout membership.

These facts require us to address two separate issues, restriction of membership and restriction of leadership. As a "place" of public accommodation, the Boy Scouts should not have revoked Dale's membership. I must concur with the majority in that regard.

What of the second issue?

In January 1993, several years after revocation of Dale's membership, the Boy Scouts promulgated a Position Statement providing, in pertinent part:

> The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts. The reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.
>
> Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law.
>
> * * * *
>
> The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.

> We do not believe that homosexuals provide a role model consistent with these expectations.
>
> Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

The present members of the Boy Scouts number approximately five million. We are told that as many as ninety million boys and men have enjoyed membership in the Boy Scouts since 1910. Surely the Boy Scouts are aware that, statistically, a number of these must have been gay. There obviously has been no anti-gay witch hunt in the Boy Scout movement.

The defendants' consistent theme is evident; scouting condemns homosexual practice as morally unacceptable, and so acts negatively with respect to its open avowal because it is inconsistent with one of the expressed moral policies of the organization.

The 1972 Scoutmaster's Handbook emphasized a scout leader's duty as a role model, and advised:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons . . . . What you are speaks louder than what you say. This ranges from simple things like wearing the uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.

If their perception of the immorality of homosexuality is in fact an important part of the Boy Scouts' institutional message to young Scouts, what Jim Dale openly professes and exemplifies clearly flies in the face of that view. When we force the Boy Scouts to permit him to serve as a volunteer leader, we force them equally to

endorse his symbolic, if not openly articulated, message. I believe that this violates the right of expressive association guaranteed by the First Amendment of the United States Constitution. Even when a membership association provides public benefits to which this State may insure equal access under the LAD, such compelled access to membership does not carry with it a right to "trespass on the organization's message itself." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 *U.S.* 557, 580, 115 *S.Ct.* 2338, 2351, 132 *L.Ed.*2d 487, 508 (1995); *New York State Club Ass'n, Inc. v. City of New York*, 487 *U.S.* 1, 108 *S.Ct.* 2225, 101 *L.Ed.*2d 1 (1988). We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others. *Hurley, supra*, 515 *U.S.* at 581, 115 *S.Ct.* at 2351, 132 *L.Ed.*2d at 508. This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs.

As applied to Dale's status as scoutmaster, I differ with the majority's reliance upon *Roberts v. United States Jaycees*, 468 *U.S.* 609, 104 *S.Ct.* 3244, 82 *L.Ed.*2d 462 (1984). There, only admission to Jaycee membership was the issue. Of course, the Boy Scouts were not organized for the primary purpose of advancing an anti-gay agenda. However, nothing in *Roberts* prevents an organization from advocating its view that a gay lifestyle is immoral and undesirable without requiring it to provide a platform for competing advocacy, express or implicit. Indeed, as *Hurley* demonstrates, the First Amendment guarantees the Boy Scouts that right of unfettered advocacy.

To the extent the majority opinion questions the fundamental nature of the Boy Scouts' profession of an organi-

zational view on homosexuality, there are two equally dispositive responses. First, it is not for this court to tell the Boy Scouts what to believe or what to profess. That is an internal matter. Their consistent litigation stand in cases like this, and the representations of their governing officials are enough for me. There has been no contravening intervention by opposing Boy Scout groups, although other, non-affiliated, *amici curiae* are abundantly represented in this appeal.

Secondly, when limited to the First Amendment issue of the expressive effect of elevating Dale to an adult leadership role (as distinct from his admission to or retention of Boy Scout membership), whether or not the Boy Scouts' stand on homosexuality is fundamental to that organization's creation is entirely irrelevant.

Based upon the above views, I respectfully dissent from the majority opinion to the extent it would compel the Boy Scouts to accept plaintiff James Dale as assistant scoutmaster or to any Scout leadership position. I concur with the majority result, to the extent that it would require plaintiff to be restored to membership.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY

Docket No. MON-C-330-92
Civil Action

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA an
THE MONMOUTH COUNCIL BOY SCOUTS OF AMERICA,

Defendants.

Decided: November 3, 1995

FINDINGS OF FACT AND OPINION

McGANN, JR., J.S.C.

This matter came before the court on cross-motions for Summary Judgment. The many certifications supplied by the parties, while voluminous and informative, present no substantial issues of material fact. The briefs submitted by both sides have likewise been fulsome, nonetheless, but clearly and competently delineate and argue the issues. Accordingly, summary judgment is apt.

THE FACTUAL BACKGROUND

Plaintiff, James R. Dale (born August 2, 1970 as James R. Dick) was a youth member in the Scouting movement continually from age eight until age 18. He began his scouting career as a Cub Scout and, as a Boy Scout, proceeded through the seven badge levels of advancement from Tenderfoot to Eagle Scout.[1] He was thoroughly immersed in scouting during his formative years and compiled a most commendable scout record.

His leadership ability during those years was recognized by his adult scoutmasters and his peers. He was appointed Assistant Patrol Leader in his troop in 1982; Patrol Leader, in 1983; Bugler from 1984 through 1988; and Junior Assistant Scoutmaster from 1985 through 1988.

He received the Arrow of Light Award for his work on behalf of the environment and the World Conservation Award based on his concern for protection of wildlife. In the years from 1984 through 1988 he held various offices in the Order of the Arrow—a national brotherhood of honor campers of Boy Scouts of America (hereinafter referred to as BSA).[2] He was, at various times, Banquet Chairman, Vigil Honor Chairman, Camping Promotions Chairman and Ceremonies Chairman of the Order. The

[1] Those levels are Tenderfoot, Second Class, First Class, Star, Life and Eagle. To advance from one badge level to the next a certain number of merit badges must be earned. Those badges cover a wide range of specified activities and subjects. Each step involves learning, testing, reviewing and, finally, recognition of achievement. In order to become an Eagle Scout, the boy must earn a total of 30 Merit badges.

[2] The purposes of the Order of the Arrow are to recognize those Scout campers who best exemplify the Scout Oath or Promise and the Scout Law in their daily lives, to develop and maintain traditions and spirit; to promote Scout camping, and to crystalize the Scout habit of helpfulness into a life purpose of leadership in cheerful service to others.

last-mentioned office involved the induction of new members into the Lodge, the Ordeal, and the Brotherhood and challenging them to live up to the Scout Oath and the Scout Law. He was very active in recruiting new Boy Scout youth members.

Over the years, James Dick attended various BSA leadership training programs including Brownsea Junior Leader Training, Order of the Arrow National Leadership Conference, and the annual leadership retreat for the Order of the Arrow, Na-Tsi-Hi Lodge No. 71.

All of these activities brought him to the attention of the Monmouth Council. Because of his exemplary record and public speaking ability he was asked to speak on behalf of Scouting at various functions and fund-raising events. In 1987 he was the featured youth speaker at the annual Joshua Huddy Distinguished Citizenship Award Dinner of the Monmouth Council.

Shortly after receiving his Eagle Badge in July of 1998, James Dick turned 18; his status as a Boy Scout automatically terminated as provided in the By-Laws of BSA. Thereafter, he was invited to apply for adult membership in BSA as an Assistant Scoutmaster. He did so in early 1989; was accepted and given a commission as an Assistant Scoutmaster by the BSA on recommendation of the Monmouth Council and assigned to Troop 73 Matawan, New Jersey, sponsored by the Matawan First United Methodist Church. That was the troop of which he had been a member during all of his scouting career.

In September 1988, James Dick (now using the name James Dale)[3] enrolled in Cook College of Rutgers Uni-

[3] A judgment granting the name change was entered on October 21, 1988 based on a complaint filed August 5, 1988.

versity. By that time he had acknowledged to himself, to his friends and to his family that he was homosexual.[4] On campus he became co-president (with a female) of the Rutgers University Lesbian and Gay Alliance.

In July 1990 an on-campus seminar sponsored by the Alliance drew newspaper coverage. The Newark Star-Ledger ran an article on July 8, 1990 captioned "Seminar addresses needs of homosexual teens." In an accompanying photograph, Dale's picture appeared with that of the featured speaker and the co-president of the Alliance. He was identified as co-president of the Lesbian and Gay Alliance in both the photograph and text.

That article came to the attention of the Executive of the Monmouth Council, BSA—Mr. James W. Kay. He sent the following letter dated July 19, 1990 to Dale:

> Dear Mr. Dale:
>
> After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America.[5]
>
> You should understand that BSA membership registration is a privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of

[4] He had not, however, told that to his Troop Committee Chairman who sponsored him for adult membership. Had he done so, he would not have been sponsored nor commissioned as an adult member by BSA.

[5] Dale was not stripped of any awards he had previously earned as a Boy Scout. He remains on the records of BSA as a former Boy Scout who attained the high rank of Eagle Scout.

> membership which the BSA seeks to provide for American youth.
>
> If you wish to have this decision reviewed by a BSA regional review committee, please write to the Regional Director within 60 days of the date of this letter, explaining your version of the facts supporting your claim that your registration as a BSA member should be reinstated. The procedures for a review of this decision are attached.

Dale wrote asking the reason for that action. In his reply of August 10, 1990, Kay stated "The grounds for this membership revocation are the standards for leadership established by the Boy Scouts of America which specifically forbid membership to homosexuals." Despite the repeated requests by Dale and later by his counsel, for a copy of those "standards" none was ever supplied. A reply to Dale's counsel from the national counsel of BSA dated December 21, 1990 states BSA's position as follows:

> "As your client is apparently an avowed [6] homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting."

Dale appealed that decision through the various procedural avenues accorded by the structure of BSA, to no avail.

It is quite clear that, although a framework of "procedural due process" is available within the structure of

[6] The context of the correspondence makes it apparent that the use of the modifier "avowed" was intended to describe BSA's understanding that Dale was a sexually active homosexual and it was so understood by Dale and his counsel when they read the letter.

BSA, no serious hearing was ever accorded to Dale on the merits of whether an actively homosexual Assistant Scoutmaster could be or should be compatible with the goals of scouting—as Dale was prepared to argue had the opportunity been presented to him. In other words, the governing powers of BSA had made their own irrevocable decision which they would not change but for the compulsion of a court order. This action then followed.

It is stipulated that Dale is homosexual not only by inclination and preference but that he is a sexually active homosexual.

Dale takes the position, sincerely, that his Boy Scout training instilled in him the belief that "honesty is the best policy" including, among other matters, his sexual orientation. He was never aware, he states, of any written policy in any of the many publications of BSA that "avowed" homosexuals are not permitted in the BSA. He made no inquiries. Affirmatively he states that he is aware of other homosexuals active in scouting against whom no adverse action has been taken because they have not "gone public" with their sexual orientation as did he. He can perceive no per se conflict between the ideals and goals of BSA and his homosexual orientation, "avowed" or not.

We are left then with the fact that the defendants did discriminate (in the broad sense) against plaintiff because of his homosexual "affectional or sexual orientation". Is, then, Dale entitled to an order restoring him to adult membership in BSA and to his former position based on 1) the New Jersey Law against Discrimination (hereinafter NJLAD) or 2) common law policy considerations, or 3) equitable estoppel? Should he, in addition, be awarded compensatory and punitive money damages, counsel fees and costs?

Plaintiff's Complaint seeks relief on the following specified grounds; to wit, that

I. Defendants violated the NJLAD, N.J.S.A. 10:5-1 to 19, and specifically the rights accorded by N.J.S.A. 10:5-12(f) in that, as a "place of public accommodation," BSA discriminated against plaintiff by withholding or denying him "the accommodations, advantages, facilities and privileges" of BSA—as a place of public accommodation—on the basis of his "affectional or sexual orientation".

II. Defendants violated N.J.S.A. 10:5-12(a) in that, as employers, they "discharged" Dale, "as an employee", because of his "affectional or sexual orientation".

III. Defendants violated N.J.S.A. 10:5-12(l) in that BSA "refused to do business" with plaintiff based on his "affectional or sexual orientation".

IV. Defendants' actions in expelling plaintiff from membership in BSA on the basis of his affectional or sexual orientation violated the public policy of New Jersey as codified in the NJLAD.

V. Defendants' intentional revocation of plaintiff's membership in BSA without according him procedural due process violated New Jersey common law governing membership organizations; caused him emotional distress for which he is entitled to compensatory and punitive damages.

VI. Defendants should be estopped from revoking plaintiff's membership in BSA because they never informed plaintiff of their policy against admitting or retaining homosexual boys and men as members and thereby led him into a commitment of time and effort to an organization which he would have voluntarily left years before, had he known.

THE NATURE OF SCOUTING IN THE UNITED STATES

A. THE HISTORY OF SCOUTING

The Boy Scout movement was founded in England in 1907 by Lieutenant General, Sir Robert S. Baden-Powell. His book "Scouting for Boys" published in 1908 furnished the basis for all that scouting became, and it remains so to the present day. In 1910, with the assistance of his sister, Baden-Powell founded the Girl Guides (now Girl Scouts). Both movements spread rapidly throughout the civilized world. By 1920 the First International Scout Jamboree was held and continues to be held on a quadrennial basis.

Since Baden-Powell was a military leader, the organization for boys which he conceived and created has many military attributes. Members wear uniforms with insignia and badges; there is a chain of command; organizational units are called Posts, Troops and Patrols; there is achievable upward movement within the ranks based on merit.

Fundamental to becoming a boy scout was, and continues to be, the promise of the boy that on his honor, he will do his best to do his duty to God and his country; to help other people at all times and to obey the Scout Law. That oath—expressing a chivalrous code of behavior easily understood by a young lad—is taken by each scout candidate in a solemn fashion.

In every country of the world where Boy Scouting is present, the same basic pattern outlined by Baden-Powell is followed, with but small variations as national traditions and culture may require. The world-wide activities of scouting are overseen by the Boy Scouts International bureau established in 1920. Except for necessary professional and administrative personnel, Boy Scouting from

top to bottom is conducted by adult volunteers. They receive no compensation or material reward of any kind.[7]

B. THE STRUCTURE OF BOY SCOUTS OF AMERICA

Boy Scouts of America was first incorporated in 1910 as a not-for-profit corporation in the District of Columbia. Support for the aims and principles of scouting was so strong, nationwide, that on June 16, 1916 a new corporate charter was issued to Boy Scouts of America by Act of Congress.

In the Report of The House Committee on the Judiciary in support of the Act, Congress stated:

> The Boy Scout movement is . . . intended to supplement and enlarge established modern educational facilities in activities in the great and healthful out of doors where may be the better developed physical strength and endurance, self-reliance, and the powers of initiative and resourcefulness, all for the purpose of establishing through the boys of today the very highest type of American citizenship.
>
> It tends to conserve the moral, intellectual, and physical life of the coming generation, and in its immediate results does much to reduce the problem of juvenile delinquency in the cities . . . The importance and magnitude of its work is such as to entitle it to recognition and its work and insignia to protection by Federal incorporation.
>
> The Scout scheme is based upon the methods involved in educating the boy. It is a scheme of placing the boy on honor. In addition to requiring him

[7] The Monmouth Council, for example, has approximately 2,950 adult volunteer leaders and employs 4 scouting paid professionals.

to live up to a standard or code of laws which insure development of character along proper lines, it requires him to study in order to pass certain tests of qualification. The passing of these various tests is recognized by the award of appropriate badges or medals and insignia.

If any boy can secure these badges without meeting the required tests, the badges will soon be meaningless and one of the leading features of the Scout program will be lost. Likewise, with the uniform which designates a Scout. At the present time this is protected by the use of insignia—a seal woven or stamped into the cloth. All of these various badges and insignia are at present protected by the patent laws, but under the patent laws such protection is available for a limited period only. The passing by Congress of this bill will, it is believed, provide the organization with proper protection for its distinctive insignia, the integrity of which is essential to the maintenance of the movement, and protect it from those who are seeking to profit by the good repute and high standing and popularity of the Scout movement by imitating it in name alone.

The corporate charter of BSA grants the following powers:

> Section 2. That the name of this corporation shall be "Boy Scouts of America," and by that name it shall have perpetual succession, with power to sue and be sued in courts of law and equity within the jurisdiction of the United States; to hold such real and personal estate as shall be necessary for corporate purposes, and to receive real and personal property by gift, devise, or bequest; to adopt a seal . . . to make and adopt bylaws, rules, and regulations not

> inconsistent with the law of the United States of America, or any State thereof, and generally to do all such acts and things . . . as may be necessary to carry into effect the provisions of this Act and promote the purposes of said corporation.
>
> Section 3. That the purpose of this corporation shall be to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scout craft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts.
>
> Section 4. That said corporation may acquire, by way of gift, all the assets of the existing national organization of Boy Scouts, a corporation under the laws of the District of Columbia, and defray and provide for any debts or liabilities to the discharge of which said assets shall be applicable; but said corporation shall have no power to issue certificates of stock or to declare or pay dividends, its object and purposes being solely of a benevolent character and not for pecuniary profit to its members.

In Section 5 the charter provides that "the governing body of the said Boy Scouts of America shall consist of an executive board composed of citizens of the United States. The number, qualifications, and terms of office of members of the executive board shall be prescribed by the by-laws . . ."

The By Laws of BSA establish its national office in Irving, Dallas County, Texas. The Purpose of BSA (Article I, Section 2) is stated as follows:

> Section 2: The purpose of the Corporation is as set forth in the original certificate of incorporation under

the laws of the District of Columbia, dated February 8, 1910, and restated in the Act of Incorporation enacted by the Congress of the United States of America on June 15, 1916, as follows: "The purpose of this Corporation shall be to promote, through organization and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scout craft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now a common use by Boy Scouts." In achieving this purpose, emphasis shall be placed upon its educational program and the oaths, promises, and codes of the Scouting program for character development, citizenship training, mental and physical fitness.

As created by the By-Laws and Rules and Regulations which flesh them out, BSA is structured—proceeding from top to bottom—in the following manner:

I The National Council

II Regional Committees

III Area Committees

IV Local Councils

V Local Units (Packs, Troops, Varsity Teams or Posts)

I. *THE NATIONAL COUNCIL.* The National Council is comprised of the following members:

a) all members of its Executive Board;

b) members of the Regional Executive Committee;

c) Local Council Representatives (president and council commissioner plus an additional member for every 5,000 youth members);

d) members at large elected by the National Council for 1 year terms;

e) Honorary (non-voting) members as elected by the National Council for 1 year terms.

It meets annually at the call of its Executive Board for the reception of reports of various officers and committees and to elect members both at large and honorary as well as to transact such business as presented by the Executive Board.

Its officers include a President, Executive Vice-President, one or more Vice Presidents, Treasurer and Assistant Treasurers, the National Commissioner (who is the chief morale officer and who represents BSA in national affairs); the International Commissioner (who represents BSA in international affairs) and the Chief Scout Executive who is designated as "the chief executive officer of the Corporation and shall have general direction of the administrative work of the corporation". He is required to prepare an annual report of BSA to transmit it to Congress and to present it to the annual meeting of the National Council.

The Executive Board is the governing body of BSA. Members (not to exceed 64) are elected for 1 year terms at the annual meeting of the National Council. Regional presidents are ex-officio members of the Board. The chairman of the Advisory Council (to the Executive Board) and chairman of the Board of Regents of the National Eagle Scout Association, are likewise ex-officio members. Up to five registered Youth Members from around the nation may be appointed by the President with approval of the Board to a one year term. Regular meetings of the Board occur three times each year.

The Executive Committee of the Board consists of the President of the Board, the executive vice president, the

vice presidents, Regional presidents, the international commissioner, the national commissioner, the treasurer, the assistant treasurers, the Chairman of the support committee of the Executive Board, Chairman of the Advisory Council, the Chief Scout Executive and the immediate past-President.

It meets at the call of the President and may exercise all the powers of the Executive Board during the intervals between Board meetings.

Various Standing Committees of the Board are provided for, to wit: Support, Nominating, Audit, Finance and Contract Review.

An Advisory Council to the Board also exists. It is large in number consisting of the National Council together with "United States citizens who, because of experience, have a particular expertise that would benefit the national movement." Those members have no specified term. They are elected by the Board. The chairman of the Advisory Council is appointed by the President of the Board and serves a term of 1 year. One annual meeting of the Advisory Council is mandatory. It advises "on matters of major national concern."

All of the foregoing are volunteers except for the National Commissioner, International Commissioner and Chief Scout Executive.

II *REGIONAL COMMITTEES.* For ease in administration the Executive Board is empowered by the By Laws to divide up the United States into various regions. Each region is subject to governance of the Regional Committee (composed of members of the National Council residing in the region plus youth members as appointed by the regional president). Each region must implement national BSA policy and program. The Regional Committee must meet once a year.

A Regional Board exercises the authority and responsibility of the Regional Committee whenever the Regional Committee is not in session. Its membership consists of the Regional Executive Committee, the regional vice-presidents plus not more than 50 members at large elected annually by the Regional Committee. The Regional Board may also have up to five youth members with 1 year terms appointed by the regional president. The Board must meet annually to plan events and activities for the region and to train members of the various standing committees. All of its members are volunteers.

The Regional Executive Committee conducts the affairs of Scouting in the region on a day to day basis in conformity with regional committee and board policy. It consists of the regional president and vice-president, area presidents, chairmen of the regional standing committees and the regional director. The last named person serves as secretary of the Regional Committee, the Regional Board, the executive committee of the Board and the Standing Committees.

III *AREA COMMITTEES.* The various regions are then geographically subdivided into areas governed by an Area Committee. Each area committee includes its executive committee (composed of the president, area vice-president(s) and various committee chairmen of standing committees), the regional council president and National Council members residing in the area. They, too, are all volunteers.

IV *LOCAL COUNCILS.* The smallest administrative structure within BSA is the Local Council. The defendant, Monmouth Council Boy Scouts of America, is a local council. Local Councils are subject to the governance of the Area Committee. They are "chartered" by BSA. On application and approval by the Executive Board a

new charter will issue for a period of not more than one year ending on June 30. The charter may thereafter be renewed annually provided the council has met all responsibilities required of it by the By-Laws and Rules and Regulations during the prior year. Each Council must, therefore, report annually on its operations for the preceding year. The charter may be terminated by BSA if "it deems such action advisable in the interests of Scouting." It is recommended that, when chartered, the Local Council incorporate under state law as a non-profit corporation. Most Local Councils (including Monmouth Council) do so.

Monmouth Council is one of 93 councils grouped together in the Northeast Regional Council of BSA. Local Councils report to it on finances, scouting membership, numbers of scouts attending camps and on their review of charter renewal applications for the Troops and Packs. The Regional Council in turn reports to the National Council, BSA. The National Council, which approves all charters and renewals as well as the appointment of adult members, publishes all training materials and handbooks for members and leaders.

Local Councils are responsible: 1) to insure that each Local Unit (i.e. a Boy Scout Troop or Cub Pack) within its territorial area carries out the general principles of advancement in Scouting; 2) to insure the integrity of the merit badge requirements for advancement in scouting; 3) to make Scout training available to the Local Units and community groups using the Scouting program; 4) to provide adequate leadership and leadership training for the Local Units; 5) to insure that standards in Scout policies, badges and insignia are protected; and 6) to insure that adequate financing exists for the support of the Local Units.

Membership of the Local Council (minimum age 21) is made up of one representative from each of the chartered local units within its jurisdiction, together with representatives at large from various business, civil, educational, labor, social and religious interests in the community. A minimum membership of 100 adults is required. Each year the members elect 25 to 50 of their number to serve as the local council executive board which is the governing body responsible for the council's operations and assets. Officers consist of a president, one or more vice-presidents and a treasurer. The executive board may also (and usually does) elect a commissioner and a Council Executive (a paid employee).

Monmouth Council is one of 14 Local Councils in New Jersey. It oversees 80 Boy Scout Troops and 101 Cub Packs (comprising some 2,038 Boy Scouts, 5,738 Cub Scouts and 2,950 adult members) chartered to various religious, fraternal, civic and educational organizations. 35 of the 80 Boy Scout Troops are chartered to churches and church-related organizations.

Monmouth Council also provides the camping and program resources to advance the goals of Scouting. It maintains campsites at Forestburg Scout Reservation in Sullivan County, New York, and Quail Hill Scout Camp in Manalapan Township, New Jersey. It assists the Local Units to recruit new members and to raise money to support the Local Unit activities. For example, it holds an annual Bowl-A-Thon, a Golf Tournament and the Joshua Huddy Awards Dinner as fund raisers. It also coordinates the annual Troop Popcorn sale.

V. *LOCAL UNITS.* Local Units are designated as Packs (Cub Scouts), Troops (Scouts), Teams (Varsity Scouts) and Posts (Explorers). Packs are organized in smaller groups of 3 to 8 boys designated as Dens; Troops,

in Patrols; Teams, in Squads. The leadership structure and makeup of each are spelled out in the Rules and Regulations. Cub Scouts, Boy Scouts and Varsity Teams are for boys. Exploring is for young men and young women. A volunteer adult member—Scoutmaster—heads the Troop (Pack, etc). He is assisted by other volunteer adult members—assistant Scoutmasters—who attend, guide and instruct at the meetings of the Patrols (Dens, Teams). Patrols meet twice a month, separately, and then join together, twice a month, with the other Patrols at Troop meetings.

A Local Unit is directly chartered to the sponsoring group by the Executive Board of BSA based on a favorable recommendation from the Local Council. Once a Charter is granted, it is subject to revocation by the Executive Board in the exercise of its sole judgment. In most instances, charters are issued to existing organizations (church, civic, etc.). In some instances a charter may issue to a unit of interested and qualified citizens formed specifically for that purpose. In either case (existing organization or community unit) the applicant is obliged "to provide adequate facilities, supervision and leadership for a period of at least one year and to make an effort to provide youth members with an opportunity for a quality program experience as set forth in the official literature of the BSA."

Each local unit must be under the supervision of a unit committee consisting of three or more qualified adults (at least 21 years old) selected by the chartered organization. For each Pack, Troop, Varsity Scout team or Explorer Post there must be one adult who registers and serves as the unit leader. That person must be approved by and registered with the Local Council.

Active adult leadership is required for each pack, troop, varsity scout team and explorer post. Using the Scout

Troop as an example (the requirements are similar for each) the leadership consists of the three members of the unit committee plus a Scoutmaster and the assistant Scoutmaster(s).[8] Collectively they are known as the unit Scouters. All must be recommended by the Local Council and then approved, commissioned and registered as adult members by BSA. All must subscribe to the Declaration of Religious Principle set forth in the By-Laws (below at p. 31) and the Scout Oath and Law (below at pp. 29-30). Commissions of Scoutmasters and assistant scoutmasters are issued on an annual basis.

The Local Council, for ease in servicing the local units, may subdivide its area jurisdiction into geographical Districts into which local units are grouped. The District provides its Troops with a volunteer Commissioner who trains, consults and advises the members of the Troop committees and other adult leaders. District Committees are formed to help with training of leaders and to coordinate District-wide events such as a Klondike Derby, Annual Spring and Fall Camporees and the biennial Council Scout Show. They also maintain regular contact with the sponsoring organizations of the Scout Troops.

C. *MEMBERSHIP*

All persons with an active role in scouting are designated as either "Scouters" or "Youth Members". "Scouters" are registered adult members of BSA. A "Youth Member" is "one who, with the approval of a parent or guardian, if necessary, becomes a member of a unit; obligates himself or herself to attend the meetings regularly; fulfills a member's obligation to the unit; subscribes to the Scout Oath. . . ; and participates in an appropriate program based on the member's age as promulgated from time to time by the BSA."

---

[8] Assistant Scoutmasters may be commissioned at 18 years of age.

D. *ADULT LEADERSHIP (Scouters)*

Adult Leadership is treated in Article VIII of the By-Laws. Section 1 is pertinent. It reads:

> Leadership Qualifications.
>
> No person shall be approved as a leader unless, in the judgment of the Corporation, that person possesses the moral, educational, and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require.

The Rules and Regulations set forth those requirements in detail.

Article VIII, Section 2, Clause 1 states:

> Individuals serving in any official relationship with the BSA shall subscribe to the statement of religious principle, as prescribed in the By-Laws, and the Scout Oath and Law. They shall . . . be citizens of the United States.
>
> * * * *

Section 3 of Article VIII provides:

> Clause 1. All individuals in unit leadership positions . . . shall be issued commissions by the BSA.
>
> * * * *
>
> Clause 2. All individuals selected to serve as commissioners . . . shall be recommended by the Scout executive and approved by the council executive board. They shall be issued commissions by the Boy Scouts of America **on an annual basis.**
>
> Clause 3. Commissioned officials must be at least 21 years of age with the exception of those individuals

> at least 18 years of age who may be commissioned as assistant unit leaders. . .
>
> * * * *
>
> Clause 11. Unit Leadership. All recommendations to serve as . . . assistant unit leader . . . shall originate with the unit committee, the chartered organization . . . The head of the chartered organization or the chartered organization representative must approve the registration of the leader on the appropriate form. The local council must also approve the registration.
>
> Adult leadership positions shall be filled by persons 21 years of age or older, except the following, which may be filled by persons 18 years or older; . . . assistant Scoutmaster. . .

Dale became commissioned assistant Scoutmaster seven months after reaching age 18.

All Scoutmasters and Assistant Scoutmasters receive a copy of the Mission Statement and "The Scoutmaster Handbook". The Mission Statement recites that:

> *It is the mission of Boy Scouts* to serve others by helping *to instill values in young people* and, in other ways, *to prepare them to make ethical choices* over their lifetime in achieving their full potential. *The values we strive to instill are based on those found in the Scout Oath and Law:*
>
> *Scout Oath*
>
> On my honor, I will do my best
> To do my duty to God and my country and
> To obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.

Scout Law

A Scout is:

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

The handbook is a how-to-do manual. The sense of what BSA envisages for scoutmasters is conveyed by the message from the Chief Scout Executive which serves as a prologue to the 1990 (current) edition of the handbook. It reads as follows:

> As an adult leader in Scouting, you have a great opportunity to help boys discover their potential. Through a vigorous program of outdoor activities, your Scouts will learn to care for themselves in any kind of weather, set their own significant goals and reach for them, and gain in strength and confidence. One of the greatest joys of being a Scoutmaster or assistant Scoutmaster is watching boys develop into the kind of men our country needs—active citizens committed to the principles of the Scout Oath and Law, leaders who can fulfill important responsibilities in their communities and the nation.
>
> This handbook is designed to help you succeed. The chapters take you through a typical troop meeting and identify the people who will help you do your job. They tell you how to train the junior leaders who will run the troop with your help, using the patrol method. Your handbook also takes you through the program planning process, gives you a ready guide to uniforms and insignia, and explains the resources that are available to you.

> You have an important job, but you are not alone. Besides the parents of your Scouts, some of the best people resources are your Scouting professionals and volunteer commissioner staff. These dedicated people and those at your local council service center are prepared to help you make the Scouting adventure become a reality in the lives of the boys in your troop.
>
> In the years ahead, there's no telling how many men will look back on their happy, productive days as Boy Scouts and recall their Scoutmaster with a large measure of warmth and gratitude. This will be your ultimate reward in Scouting.

As the handbook points out in Chapter 6, there are three Aims of Scouting.

Aim I—To build character

Aim II—To foster citizenship

Aim III—To develop fitness.

That third aim recognizes four kinds of fitness, physical, mental, emotional, and moral. Each is discussed in detail. That dealing with "moral fitness"—as a scouting aim—bears on this case. The handbook for scoutmasters states:

> Moral Fitness: Morality, says the dictionary, concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by our conscience or ethical judgment." Scouting has recognized the importance of moral fitness from the start: A Scout who took the Scout Oath in 1910, for instance, promised to do his best to keep himself "morally straight." A Scout who takes the Oath today promises the same.

In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster.

There is much more to be said about Scouting's aims in a dynamic and changing world, in particular the problems to be faced by a Scout generation approaching the turn of our century. How can Scouting help this generation prepare for the ethical judgments they will have to make, and develop the courage they will need to make them?

We explore this more deeply in chapter 10, "Understanding Youth."

In Chapter 10—Understanding Boys—the BSA concept of "moral fitness" is treated in more detail and as related to age groups of 11 to 13 and 14 and older. Thus under the heading—Sex Curiosity—the following suggestions are made:

> Because boys of Scouting age are naturally curious about sex, you may find sexually explicit magazines being circulated during a camp-out, overhear sex talk among the boys, or discover or hear about incidents of sexual experimentation among troop members. Unacceptable publications should be removed from the scene, and those who brought them told that you don't want them around, and why.
>
> Incidents of sexual experimentation call for a private and thorough investigation, and frank discussion with those involved. Such problems should be discussed with the Scout's parents and the troop committee. You might suggest counseling by the Scout's religious leader or by a professional. However, every effort should be made to keep the matter confidential.

Under the heading "Helping Adolescents With Problems", the subheading "Health Risks" states the following:

> Teenagers are more sexually active than ever, yet many do not use any form of contraception. The result is more than 1.1 million pregnancies per year. Roughly half of these pregnancies are terminated by miscarriage or abortion. The trend is for girls who give birth to keep their babies rather than give them up for adoption. For boys, this increasingly means 18-21 years of financial responsibility for their child. Another result of increased teenage sexual activity is a corresponding increase in sexually transmitted diseases among teenagers. Particularly worrisome is the potential among sexually active teenagers for contracting the deadly AIDS virus, which may not result in symptoms for 5-7 years.

* * * *

As Scoutmaster, you will have many opportunities to help Scouts develop healthy lifestyles, avoid health risks, and adjust to any health problems or handicaps they may have. The importance of nutrition, exercise, and safety should be emphasized in all troop activities. Scouting activities should be designed to help boys develop the healthy self-concept, self-esteem, and self-respect needed to make wise decisions and to assume responsibility for themselves in their personal lives.

Being involved in an active troop may help boys avoid temptations which might otherwise jeopardize their health and well being. Guest speakers can provide information on developing a healthy lifestyle,

avoiding accidents, and making decisions regarding substance use. If Scouts ask for information regarding substance use or sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional. If you become aware that a Scout is involved in substance use or abuse or is sexually active, you will need to involve the Scout's family or direct him to competent professionals.

Lastly, in discussing the subject of "Child Abuse" these comments are made to the Scoutmaster:

Sexual abuse may be inflicted for a number of reasons. There are individuals who have sexual fantasies about children. Such individuals are referred to as pedophiles. All child molesters are not pedophiles; children are sexually molested for other reasons. The molestation may be an inappropriate exercise of power over the child, or the molester may be sexually indiscriminate and take advantage of adults as well as children. While it is true that most child molesters are male, there is a growing awareness of sexual abuse of boys by women.

* * * *

The BSA has developed materials for use in the Scouting program that provide essential information to members and their families. A detachable booklet in the front of The Boy Scout Handbook, "How to Protect Your Children from Child Abuse and Drug Abuse: A Parent's Guide, provides information to help families to increase self-protection skills. *A Time to Tell* is a video produced by the BSA for showing at troop meetings that addresses the problem of sexual abuse of boys 11 to 14 years old. *Boys' Life and Scouting* magazines have regular features providing up-to-date information concerning the youth protection program of the BSA.

A critical element of the youth protection program is the training of Scouting's volunteer leaders. "Youth Protection Begins with You" is the theme of this training session. In less than 2 hours, volunteer leaders receive information preparing them to conduct Scouting activities in accord with your protection guidelines.

Because of the critical roles of the Scoutmaster and assistant Scoutmaster, the selection of people to fill these roles is the most important function of the Troop Committee, the group of adult volunteers that serves as governing board of the Troop. The position of Scoutmaster or assistant Scoutmaster is limited to those who meet a host of formal and informal criteria. The Troop Committee seeking a Scoutmaster looks not only at the candidate's age, sex, religious beliefs, education, emotional health and moral values but also at the candidate's maturity, judgment, leadership qualities, ability to work with boys, ability to win the confidence of parents, ability and willingness to devote the necessary time, relevant knowledge and experience, and a number of other factors. The *Troop Committee Guidebook* lists "high moral standards" as the most important characteristic to have in a Scoutmaster or assistant Scoutmaster. Again, they are commissioned on an annual basis and must be re-commissioned each year.

E. *YOUTH MEMBERSHIP*

Article VII of the **By Laws** treats of Youth Membership in the following fashion:

> Section 1. Youth membership in Boy Scouts of America is open to all who meet the membership requirements. Cub Scouting, Boy Scouting, and Varsity Scouting are for boys. Exploring is for young men and young women.

The basic BSA program is that of Cub Scouts and Boy Scouts for boys from 8 to 18. The Scout Oath and Scout Law are the foundation of the program.

Clause I of Article VII of the **Rules and Regulations** enlarges on what is generally required of a scout be considered an "active youth member" of BSA. Thus

> An active youth member is one who, with the approval of a parent or guardian if necessary, becomes a member of a unit; obligates himself. . . to attend the meetings regularly; fulfills a member's obligation to the unit; subscribes to the Scout Oath . . . and participates in an appropriate program based on a member's age, as promulgated from time to time by the Boy Scouts of America.

In addition—in Article IX, Clause 3 of the **Rules and Regulations**—each scout must know and subscribe to the Scout Oath or Promise and the Scout Law, which are:

The Scout Oath or Promise

On my honor I will do my best
To do my duty to God and my country and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong, mentally awake, and morally straight.

The Scout Law

A Scout is:

Trustworthy. A Scout tells the truth. He keeps his promises. Honesty is part of his code of conduct. People can depend on him.

Loyal. A Scout is true to his family, Scout leaders, friends, school and nation.

Helpful. A Scout is concerned about other people. He does things willingly for others without pay or reward.

Friendly. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs other than his own.

Courteous. A Scout is polite to everyone regardless of age or position. He knows good manners make it easier for people to get along together.

Kind. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not hurt or kill harmless things without reason.

Obedient. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

Cheerful. A Scout looks for the bright side of things. He cheerfully does tasks that come his way. He tries to make others happy.

Thrifty. A Scout works to pay his way and to help others. He saves for unforeseen needs. He protects

and conserves natural resources. He carefully uses time and property.

Brave. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at or threaten him.

Clean. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

Reverent. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

All of the foregoing requirements for Adult Leadership and Youth Membership are completely consonant with the **Declaration of Religious Principle** contained in Article IX Section 1 of the corporate **By-Laws,** which states:

Clause 1. The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgement of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude toward the religious

training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

Activities.

Clause 2. The activities of the members of the Boy Scouts of America shall be carried on under conditions which show respect to the convictions of others in matters of custom and religion, as required by the twelfth point of the Scout Law, reading, "Reverent. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."

Freedom.

Clause 3. In no case where a unit is connected with a church or other distinctively religious organization shall members of other denominations or faith be required, because of their membership in the unit, to take part in or observe a religious ceremony distinctly unique to that organization or church.

Leaders.

Clause 4. Only persons willing to subscribe to these declarations of principles shall be entitled to certificates of leadership in carrying out the Scouting program.

Clause 5. Other major policies are set forth in article IX of the Rules and Regulations.

Program Objectives (Article X, Section 1) are:

The program shall be one designed to achieve objectives in character development, citizenship training, and mental and physical fitness.

> In its several phases the program shall be adapted to the groups into which youth members are divided and shall be as set forth from time to time in these By-laws and in the Rules and Regulations of the Corporation.
>
> In all activities, emphasis shall be placed upon practice in daily life of the principles of the Tiger Cub Promise, the Cub Scout Promise, The Scout Oath or Promise, and the Explorer Code. In association with suitable adult leadership, members registered in Scouting will be guided to develop traits of character which are expressed in self-reliance, consideration of and help to others, personal courage, and above all in lives of useful citizenship.

The "bible" for all Scouts is The Boy Scout Handbook. As to what is required and what it means to be a Boy Scout it remains essentially unchanged since the First Edition published in 1910. The current edition is the 10th (Fourth Printing). Since 1910 a total of 34,860,000 Handbooks have been printed.

The applicant for membership in BSA is told that he must complete the following requirements to become a Boy Scout.

> At your first troop meeting, your Scoutmaster will explain the following joining requirements of the Boy Scouts of America:
>
> Submit a completed Boy Scout application and health history signed by your parent or guardian.
>
> Repeat the Pledge of Allegiance (page 468).
>
> Demonstrate the Scout salute, sign, and handclasp (page 468).

> Show how to tie the square knot (also known as the joining knot) (pages 132-133, 141).
>
> Understand and agree to live by the Scout Oath (pages 549-551), the Scout Law (pages 553-561), the Scout motto (page 562), the Scout slogan (page 563), and the Outdoor Code (pages 55-59).
>
> Describe the Scout badge (page 565).
>
> With your parent or guardian, complete the exercises in the pamphlet **How to Protect Your Children from Child Abuse and Drug Abuse.**[9]
>
> Participate in a Scoutmaster conference (pages 589-590).
>
> When you have completed these, welcome! You are a Scout! Your Scoutmaster will give you a certificate of membership, and you can proudly wear the Boy Scout badge and uniform. You may also subscribe to **Boy's Life,** a monthly magazine that is full of exciting articles for and about Scouts.

In Chapter 22 of the Handbook which addresses Personal Development there is the sub-heading "Good Judgment." The scout is told (passim):

> Good judgment is the ability to make wise decisions even under difficult conditions. You don't need great knowledge in order to use good judgment. You just have to do your best with what you already know.
>
> * * * *
>
> Part of good judgment is choosing friends. You spend a lot of time with the people you enjoy. You learn from them, have fun with them, and want them to like you.
>
> Hang on to friends who have attitudes and values you admire. Seek out those with healthy interests.

---

[9] A recently added requirement.

Share adventures with people who want to make the most of themselves.

However, don't limit your opportunity to meet someone new just because he or she is not exactly like your other friends. Differences of race, culture, and language can be the basis of many close bonds. Some people are shy, so it may be up to you to open the door to friendship. Visit with them at school. Invite them to join in with Scouting events, ball games, and neighborhood activities. You will be surprised how eagerly others respond to your offers of friendship.

* * * *

The language you and your friends use is a clue to how you think about the world. Swear words, dirty jokes, and crude talk often are used as weapons to hurt other people. Clean language is a mark of intelligence, kindness, and respect for other people.

Once in a while, you may discover that some of the people you know are using tobacco, alcohol, or illegal drugs. They may pressure you to use them, too. However, you know that real friends would not want you to do things that could harm your health or cloud your mind. If smoking, drinking, or drugs are a part of your circle of friends, you may need to find new friends who are more interested in making the most of their lives. Don't worry, they are out there. Look around and you will find them.

An entire subsection is devoted to Sexual Responsibility. In itself it is a declaration of policy by BSA and is set forth in its entirety.

As you grow into manhood, your friendships will change. People around you are also changing. Girls you know are becoming young women. They are

growing both physically and emotionally. Your relationships with them will become closer and more meaningful to you and to them.

You are maturing sexually, too. As a young man, you are capable of becoming a father. That is a profound responsibility with powerful consequences in your life and the lives of others. It is a responsibility that requires your very best judgment.

Sex is not the most important or most grown-up part of a relationship. Having sex is never a test of maturity. True manliness comes from accepting the responsibility for your actions toward others and yourself in the following ways:

Your responsibility to women. Whenever you like someone, you want the best for that person. A healthy relationship is supportive and equal. You owe it to the women in your life to keep their best interests in mind. You can have a terrific time together enjoying life and growing emotionally. However, the difficulties created by a pregnancy can be enormous. Don't burden yourself and someone you care for with a child neither of you is ready to bear.

Your responsibility to children. When you are fully grown and have become secure in yourself and in your relationship with another person, the two of you may decide to marry and have a child. That is a wonderful choice full of challenges and rewards. By waiting until you are thoroughly prepared to be parents, you can give your own child a close, loving family in which to grow.

Your responsibility to yourself. An understanding of wholesome sexual behavior can bring you lifelong happiness. Irresponsibility or ignorance, however, can cause a lifetime of regret. AIDS and venereal

diseases spread by sexual contact may undermine your health and that of others. Having a baby before you are ready may drastically limit your future chances for education, occupations, and travel.

You owe it to yourself to enter adulthood without burdens. You owe it to yourself to enrich your life by learning what is right. Your religious leaders can give you moral guidance. Your parents or guardian or a sex education teacher should give you the facts about sex that you must know.

Learn by asking, remember? If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster. They have experienced much of life, and they are interested in what is best for you. Let them know your concerns.

James Dale used the Boy Scout Handbook for years. He was familiar with the Declaration of Religious Principle and had subscribed to the Scout Oath and Promise and Scout Law. When he applied for adult membership as an assistant scoutmaster he stated that he would adhere to the principles and policies of Scouting including the Declaration of Religious Principle, the Scout Oath and Promise and the Scout Law. He read the Scoutmaster Handbook. The version which he used was the 1972 edition. The subject of "Sex Curiosity" was treated therein as follows:

> In the age span covered by the Scouting program, boys discover sex as one of the realities of living. They are naturally curious about it, and they may have limited opportunity to find out about it.
>
> It seems to be general belief that boys should learn of sex and family life at home, from their parents. While there are few objections to this principle, it is

not borne out in fact that this teaching actually occurs.

You must respect the right of parents to teach their sons about life. You must also recognize that many of them will not do this very well, and some won't do it at all. Some of their failings will come to light in your troop.

If you find magazines at practically any level of obscenity being circulated during a campout.

You may have boys asking you for information or advice about sexual matters.

You may overhear dirty stories or dirty talk, both informed and uninformed, in the troop.

You may discover or hear about incidents of sexual experimentation among troop members.

How should you handle such matters?

Rule number 1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do so.

Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.

Rule number 3: You should refer boys with sexual problems to persons better qualified than you tc handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a

highly professional role. And at the other extreme, avoid passing the buck.

And now how about some of the questions we raised?

Publications that you judge unacceptable should be removed from the scene, and those who brought them told that you don't want them around, and why.

Incidents of sexual experimentation that may occur in the troop could run from the innocent to the scandalous. They call for a private and thorough investigation, and frank discussion with those involved. *It is important to distinguish between youthful acts of innocence, and the practices of a confirmed homosexual who may be using his Scouting association to make contacts. A boy of 15 or so cannot be assumed to be acting out of innocence, and should be separated from the troop for the protection of younger boys.* (Emphasis supplied)

Thus, when Dale states that he did not know that BSA had a policy against commissioning a sexually active homosexual assistant scoutmaster he is not worthy of belief.

LEGAL ANALYSIS

It is abundantly clear from the proofs presented by BSA that from its inception Scouting has excluded from membership and adult leadership any person who openly declares himself a homosexual and that such policy has continued unchanged, to the present. Such policy applies, a fortiori, to one who engages in homosexual conduct. It is the firm position of BSA that such conduct is not "morally straight" under the Scout Oath nor is it "clean" under the Scout Law.

Homosexuality is defined in the American Heritage Dictionary of the English Language (1969) as "1. Sexual

desire for others of one's own sex. 2. Sexual activity with another of the same sex." That is an acceptable working definition for the purpose of this case. Plaintiff is a homosexual by inclination and by action. In its secondary meaning homosexuality becomes sodomy—i.e. "anal copulation of one male with another." *id.* "Buggery" is a vulgar equivalent of sodomy.

"Sodomy" is derived from the name of the biblical city, Sodom, which, with the nearby city of Gomorrah, was destroyed by fire and brimstone rained down by the Lord because of the sexual depravity (active homosexuality) of their male inhabitants. *Genesis 18:16 to 19:28* (King James Version.)

In the Judeo-Christian tradition the act of sodomy has always been considered a gravely serious moral wrong. That is likewise true of the Muslim and Hindu religions. The criminal laws of Western civilization and of our nation, and, until recent times, those of this state, imposed penal sanctions in addition to moral culpability. Such laws sprang from the power of government to protect "public morals" as well as public health, safety and welfare. Under those laws consensual sodomy was a crime attributable to both participants, whereas only the aggressor was at risk in a non-consensual situation.

From the founding of BSA in 1911 and until 1961, sodomy was a serious criminal offense in every state in the Union and in the District of Columbia. *Bowers v. Hardwick*, 478 U.S. 186, 193-4 (1986). In New Jersey, sodomy was a crime (and actively prosecuted) until repealed by the enactment of the New Jersey Criminal Code effective September 1, 1979. N.J.S.A. 2C:98-2.[10] Thus,

---

[10] Non-consensual sodomy is still a criminal offense under the sexual assault statute (N.J.S.A. 2C:14-2) and punishable as a second degree crime.

the former statute (N.J.S.A. 2A:143-1) stated that "Sodomy, or the infamous crime against nature, committed with man or beast,[11] is a high misdemeanor, and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 20 years or both." If committed with a child under 16 years of age, sodomy was punishable by imprisonment for not more than 30 years. N.J.S.A. 2A:143-2. As of 1986, the U.S. Supreme Court found that 24 states continued to view sodomy as a criminal offense and it affirmed their right to do so. *Bowers*, 478 U.S. at 193-4.

To suggest that the BSA had no policy against active homosexuality is nonsense. It was an organization which from its inception had a God-acknowledged, moral foundation. It required its members, youth and adult, to take the Scout Oath that they would be "morally straight". It is unthinkable that in a society where there was universal governmental condemnation of the act of sodomy as a crime, that the BSA could or would tolerate active homosexuality if discovered in any of its members. In this State that is surely correct from 1910 to 1979. BSA did not change its moral stance thereafter simply because the criminal law changed.

The criminal law has changed. The moral law—as to the act of sodomy—has not. The numerous certifications submitted by various ministers, priests and rabbis attest to that. Individual religious persons may distinguish between the moral culpability of a psychological tendency (perhaps innate) or sexual attraction to a person of the same sex, (a state of mind) but all religions deem the act of sodomy a serious moral wrong. The act is something deliberate and intentional; the thought might not be. An analogy with adultery and fornication is apt. The

[11] This related offense is usually termed "beastiality."

thought may or may not be morally culpable; the acts were, until 1979, considered criminal by the State of New Jersey.

Human beings with homosexual tendencies or thoughts have existed since the beginning of the human race and undoubtedly will continue to exist until its end. Dale argues that he is aware of others in BSA with such tendencies. He may well be correct. BSA is a vast organization. But when the tendency turns to action, the bible story of Sodom, the common law penal laws, the laws of New Jersey up to 1979 and universally held religious positions, condemn that act. Today in New Jersey the moral law as espoused by the major religions continues to declare the act of sodomy to be a serious wrong. Government no longer does.

BSA is a moral organization. Recognition of that basic reality explains the sponsorship of Boy Scout troops by all of the major religions. They believe, as the certifications demonstrate, that the BSA is compatible with and supportive of the moral principles which they espouse. That is why so many troops throughout the country, in New Jersey and in the Monmouth Council, are sponsored by churches and invited to meet in church facilities.

According to its mission and purpose, BSA has determined that an assistant scoutmaster who is an active sodomist is simply incompatible with scouting and is not "morally straight". Does the NJLAD require a fundamental, court-imposed, change in its policies? The short answer is No.

Dale argues that he was legally damaged by the revocation of his commission as an adult volunteer assistant scout master by virtue of the July 19, 1990 letter. Under BSA By-Laws all commissions are issued on an annual basis. Dale's would have expired on December 31, 1990

unless renewed for 1991. It is clear that BSA would not have renewed it.

There were no legally remediable adverse consequences to him from his termination. He had outgrown being a Boy Scout when he turned 18. BSA has not taken away any of the awards and honors bestowed on him as a boy scout. Until the day he dies he can proudly claim that he was an Eagle Scout. He was, for a short time, an unpaid volunteer whose services were terminated. By virtue of that termination he lost neither economic benefits, nor socially valuable status. The work of scoutmasters and assistant scoutmasters brings no measurable public recognition. Recompense is found in the gratitude of boys and parents for a job well done. These, as is true of most volunteers in our society, are truly "unsung heroes". Neither BSA nor Monmouth Council made any public announcement of his termination or the reason for it. If there is, presently, any public interest, it arises from this law suit. Dale has lost nothing of compensable value.

Clearly, if Dale had engaged in criminal activity such as using or dealing in controlled dangerous substances; if he were a rapist or murderer or pederast there could be no basis to claim a violation of NJLAD in revoking his commission as an assistant scoutmaster. To do less would fail to keep faith with the avowed purposes of Scouting and with the parents who entrust their boys between 8 and 18 to BSA and the principles it espouses. It would also defy common sense. Men who do those criminal and immoral acts cannot be held out as role models. BSA knows that. Active homosexuality, as noted, is no longer a crime. BSA and the major religions of the civilized world all deem it immoral. Should NJLAD be read to compel BSA to accept that form of immorality when it is perfectly clear that NJLAD could not protect

from adverse treatment, one whose immoral activity violates the criminal law as well?

Dale wishes to pursue his own life-style. He has a constitutional right to do so, now that the act is no longer criminal. But he cannot compel BSA to continue his volunteer adult leadership status when he is not in compliance with the Scout Oath, the Scout Law and the Statement of Religious Principle.

It is worthy of note that Dale's termination as an adult volunteer assistant scoutmaster does not rise to the level of an "expulsion" of a member of a professional or social service organization. In the latter class of cases members usually pay dues and membership brings with it recognized professional status or economic benefits. In such organizations expulsion of a member is legally proper, but only after the organization accords the affected person fundamental due process. *Sibley v. Carteret Club of New Jersey*, 40 N.J.L. 295 (Sup. Ct. 1878); *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 181 (1968); *Zelenka v. B.P.O.E. of the U.S.*, 129 N.J. Super. 379 (App. Div. 1974), *Cert. denied*, 66 N.J. 317 (1974); *Calabrese v Policemen's Benevolent Ass'n, Local No. 76*, 157 N.J. Super. 139 (Law Div. 1978).; *James v. Camden County Council No. 10*, 188 N.J. Super. 251 (Ch. Div. 1982); *Rutledge v. Gulian (Masons)*, 93 N.J. 113 (1983).

As pointed out in *Loigman v. Trombadore*, 228 N.J. Super. 437, 449-50 (App. Div. 1988):

> Deference has always been afforded to the internal decision making process of private associations. These associations must have considerable latitude in rulemaking in order to accomplish their objectives and generally, their private law is binding on those who wish to remain members. *See Higgins v. American Soc. of Clinical Pathologists*, 51 N.J. 191-202 (1968). *See also, Calabrese v. Policemen's Benev-*

olent Ass'n Local #76, 157 N.J. Super. 139, 146-147 (Law Div. 1978).

* * * *

There can be no question but that a non-profit corporation is authorized to adopt or amend the bylaws for the administration and regulation of the affairs of the corporation. N.J.S.A. 15A:2-10 and 15A:3-1A(11); *See Moorestown Mgmt. v. Moorestown Book Shop, et als*, 104 N.J. Super. 250, 260 (Ch. Div. 1969). Further, the constitution and by-laws of a voluntary association become a part of the contract entered into by a member who joins the association. *Leeds v. Harrison*, 7 N.J. Super. 558, 570 (Ch. Div. 1950); *accord Delmarmo Associates v. N.J. Eng'g & Supply Co.*, 177 N.J. Super. 15, 17 (App. Div. 1980). "[I]t is well established that a voluntary association may, without direction or interference by the courts, draw up for its government and adopt rules, regulations and by-laws which will be controlling as to all questions of . . . doctrine or internal policy." 6 Am Jur 2d, *Associations and Clubs*, § 5 at 433 (footnote omitted).

Generally, judicial intervention into the affairs of a non-profit association is justifiable "only when the complaining parties have suffered an invasion of their civil rights, of persons or of property." *Leeds v. Harrison*, 9 N.J. at 215; 6 Am Jur 2d, *supra*, § 28 at 453-454. Non-profit corporate associations such as the Association are given the utmost latitude in their regulation and management of intra-corporate affairs. *Leon v. Chrysler Motor Corporation*, 358 F.Supp. 877, 855 (D.N.J.) *aff'd*, o.b. 474 F.2d 1340 (3rd Cir. 1973). "The general rule is that there is no legal remedy for exclusion of . . . an individual from admission to a voluntary association no matter how arbitrary or unjust the exclusion." *Trautwein v. Harbourt*, 40 N.J. Super. 247, 268 (App. Div. 1956).

Here, the BSA and Monmouth Council "terminated" rather than "excluded" Dale from adult membership. It was done peremptorily. He sought a "due process" hearing and was denied. It is clear that all of the hearings which might have been accorded would not have changed the result. Procedural niceties are not at issue here.

As a matter of law the public policy of New Jersey which Dale claims to have been violated is that established by the NJLAD; it is not some prior common law policy. *Erickson v. Marsh & McLennon Co.*, 117 N.J. 539, 561-2 (1990); *Shanner v. Horizon Bancorp.*, 116 N.J. 433, 453 (1989).

Therefore, absent a public policy as established under the NJLAD, plaintiff has no cause for action by the court.

The NJLAD is contained in N.J.S.A. 10:5-1 through 42. Not all sections are implicated by the issues raised in this case. Those which are, are set forth as follows.[12]

10:5-2. Police power, enactment deemed exercise of.

The enactment hereof shall be deemed an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights.

10:5-3. Finding and declaration of legislature.

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because

---

[12] For clarity, particular language in the various sections deemed not pertinent to the issues are elided by . . . Bold type does not appear in the statutes but are used here to emphasize language deemed pertinent.

of race, creed, color, national origin, ancestry, age, sex, **affectional or sexual orientation,** . . . are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State. . .

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, **affectional or sexual orientation,** . . . in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. **Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.**

10:5-4. Obtaining employment, accommodations and privileges without discrimination; civil right.

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, **affectional or sexual orientation,** familial status, or sex, **subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.**

10:5-5. Definitions

* * * *

1. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, . . . any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or devices of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections or where any beverages of any kind are retailed for consumption on the premises, any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theater, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dis-

pensary, clinic or hospital, any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. **Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution,** and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed . . .

* * * *

v. "Public facility" means any place of public accommodation and any street, highway, sidewalk, walkway, **public building, and any other place or structure to which the general public is regularly, normally or customarily permitted or invited.**

* * * *

hh. "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

ii. "Heterosexuality" means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the opposite gender.

jj. "Homosexuality" means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the same gender.

* * * *

10:5-12. Unlawful employment practice or unlawful discrimination.

It shall be an unlawful employment practice, or, as the case may be, and unlawful discrimination.

(f) For any owner, lessee, proprietor, **manager, superintendent, agent** or employee **of any place of public accommodation, directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof,** or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of . . . **affectional or sexual orientation,** . . . or that the patronage or custom thereat of any person of any particular . . . affectional or sexual orientation is unwelcome, objectionable or not acceptable, desired or solicited. . .

(a) For an employer, because of the . . . affectional or sexual orientation . . . of any individual, . . . to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual . . . provided further that **it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of** clergy, religious teachers or **other employees engaged in the religious activities of the association or organization, or in following**

the tenets of its religion in establishing and utilizing criteria for employment of an employee; . . .

(1) For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the. . .

I. PLAINTIFF IS ENTITLED TO NO RELIEF UNDER N.J.S.A. 10:5-12(f)

BSA is not a "place of accommodation" under N.J.S.A. 10:5-12(f) and as defined in N.J.S.A. 10:5-5(1). The lengthy list set forth in the definition is a list of *places*—not one of organizations. A physical place to which one may point is clearly intended. *See, Sellers v. Phillips's Barber Shop*, 46 N.J. 340 (1966); *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d 468, 471 (3rd Cir. 1986), *cert. denied*, 483 U.S. 1050 (1987).

N.J.S.A. 10:5-5(1) provides a lengthy list of establishments and facilities which solicit customers or patrons as places "of public accommodation." The doctrine of *ejusdem generis* requires that in deciding whether a non-enumerated place or facility should be included in the general term "place of public accommodation" a court should find that it is "similar in nature to those enumerated". *See BOC Group v. Lummus Crest*, 251 N.J. Super. 271, 277-280 (Law Div. 1990), which considered what was includable in the definition of "merchandise" under the Consumer Fraud Act. In *Frazier v. Robin Dee Day Camp*, 44 N.J. 480 (1965), the court refused to rule that the list of "places of public accommodation" under the statute was all-inclusive, but concluded that "the listed places . . . are merely illustrative of the accommodations the Legislature intended to be within the scope of the statute. Other accommodations, *similar in nature to those*

enumerated, were also intended to be covered." (Emphasis supplied.) *Id.* at 486.

Boy Scouts of America is not a place; it is an entity which embraces and projects through its organization certain moral concepts and values. It neither owns or controls a "place" from which Dale has been excluded. The same is true of the Monmouth Council.

A Boy Scout troop bears no similarity to the enumerated places of public accommodation. It consists of a small group of boys and their adult leaders who meet together in various places, viz. their regular meeting hall, in tents during summer camp or at other scout gatherings on scout-owned properties. None of those activities or places are open to the public. The benefits to the boys spring not from the "facility" but from their interaction, training and experiences as a group. Those goals and objectives are totally different from "places" to which the public is invited. *Seabourn v. Coronado Area Council, Boy Scouts of America*, 891 P.2d 385 (Kan. 1995). Boy Scouts of America was held not to be a place of public accommodation under federal law in *Welsh v. Boy Scouts of America*, 787 F.Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir. 1993).

Dale is no longer assistant scoutmaster of Troop 73 Matawan. Troop 73 meets in a hall provided by Matawan First United Methodist Church—its chartered sponsoring organization. That hall is, of course, a "place" under the statute. Is that "place" one of "public accommodation"? It is not. It is private property which Troop 73 uses by virtue of invitation and sufferance.

Dale would seem to suggest that wherever Boy Scout troops may meet, throughout the nation, that "place" is one of public accommodation because the "public" (read age-eligible boys) have a standing invitation to attend.

The only ones invited to be boy scouts are those who are willing to take the Scout Oath or Promise and who agree to be bound by the Scout Law. To be an adult leader of scouting one must agree to be bound not only by the Scout Oath or Promise but also by the Declaration of Religious Principles. Neither is an invitation to the public to participate in the affairs or scouting.

BSA is entitled to structure its organization in a fashion it deems appropriate. It is a private organization which has done so. Membership is limited. It is not "public" in the sense of N.J.S.A. 10:5-12(f); it is not a "place" within the legislative intent. Plaintiff is entitled to no relief under that section.

However, plaintiff seeks an "expansive" interpretation of "place of public accommodation" and points to the holding in *National Organization for Women v. Little League Baseball*, 127 N.J. Super. 522 (App. Div. 1974). That case held that Little League could not continue to discriminate against females as participants. The matter involved an appeal from the order of the Division of Civil Rights ordering Little League to admit girls to participation in the same manner as boys. The appellate Court relied heavily on medical testimony opining that in the age bracket in question (8 to 12 years) girls' athletic and physical ability was the equivalent of that of boys. It held that "[l]ittle League is a public accommodation because the invitation is open to children in the community at large, with no restriction (other than sex) whatever." *id.* at 531. It then stated that "the 'place' of public accommodation in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played." *id.*

In apparent recognition that under the rules and regulations of Little League, the "public" was not invited to

participate since only able boys between the ages of 8 and 12 were eligible), the court found added support for accommodation finding in stating that "[i]t (i.e. Little League) is public in the added sense that local government bodies characteristically make the playing areas available to the local leagues, ordinarily without charge." *id.* Query, if the playing areas were on church-related property would Little League then become a place of private accommodation?

Little League and Boy Scouts are similar in that both are not-for-profit and both are organized on a national level. In New Jersey, at least, Little League is open to both genders of age-qualified children. Scouting maintains separate organizations for the genders.

The differences are many. Scouting is a sustained program of moral character development for boys. Each activity (of the broad spectrum of activities) is designed to provide opportunities to practice and reinforce the values of the Scout Oath and Law. The focus in Little League is primarily on the development of ability in the sport of baseball in a competitive setting. In connection with that, good sportsmanship and fair play are stressed. The relationship among the troop members and adult leaders of Scouting is continuous on a year-round basis. It is personal and social. There is no public attendance. Little League provides an association of children and adults for the length of the baseball season and solely for that purpose. It thrives on public (i.e. family members and friends) attendance. Little League coaches serve as teachers of baseball skills and are role models for good sportsmanship, fairness and fatherly patience. Scoutmasters are teachers and role models of "what a man should be like" in all aspects of male adulthood. Lastly, the invitation of Little League is open to all age-eligible persons who want

to play baseball. That of Scouting is limited to those who subscribe to the Scout Oath and Law.

If a "place" meets the definition of "public accommodation" and discriminates against members of the invited public based on "affectional or sexual orientation" it runs afoul of the statute. BSA is neither a "place" nor is there an invitation to the public at large to enter, participate or make use of an "accommodation".

The defendants argue that they qualify under the exclusion contained in the definition of "a place of public accommodation" in N.J.S.A. 10:5-5(1) and therefore that they are not bound by NJLAD. The exclusion is in this language:

> Nothing contained therein shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything contained herein apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education or upbringing of a child under his control is hereby affirmed; . . .

Three exclusions are provided:

> 1) an "institution . . . . which is in its nature distinctly private",
>
> 2) an "educational facility operated . . . by a bona fide religious or sectarian institution,
>
> 3) the right of a . . . parent or one in loco parentis to direct the education or upbringing of a child. . .

The defendants assert that they are excluded in all three categories. They are correct as to the first and wrong as to the other two. BSA is not an "educational facility" as contemplated by the legislature. In the broad sense it

does educate, but not in a facility. Education takes place in the troop wherever and whenever the troop meets. Nor is BSA "a bona fide religious or sectarian institution" within the plain import of those words as, for example, would be the Southern Baptist, Presbyterian, Black Muslim, Evangelical Lutheran, Orthodox Jewish or Roman Catholic churches, synagogues and temples. That is not to say that BSA does not espouse religious principles acceptable to all of its religious sponsors—for it does. As will be seen in the discussion of Freedom of Expressive Association, below, it is quasi-religious in its nature (*See,* The Nature of Scouting, above). However, it does not qualify for the exclusion.

BSA argues that parents entrust their boys to the training and leaders commissioned by BSA and as a result BSA stands "in loco parentis to direct the education or upbringing of a child." That view stems from too broad a reading of the exclusion. "In loco parentis", in context, does not apply to a private organization but rather to a person such as a guardian or foster parent, or even a state agency, having the legal right to direct education or upbringing.

However, also as set forth above in explicating the *nature* of BSA, it is an institution which is distinctly private not public. It has membership requirements; its members wear distinctive uniforms and insignia; it has distinctive traditions and ceremonies; it articulates values and goals. These characteristics are bona fide; have existed since 1911 and are not feigned as a disguised form of discrimination. *Kiwanis International,* 806 F.2d at 476; *Welsh v. BSA* 993, F.2d 1267 (7th Cir. 1993); *Clover Hill Swimming Club v. Goldsboro,* 47 N.J. 25, 34 (1966). I find in, this exclusion, a legislative recognition of the freedom of expressive association discussed below and that BSA is protected by it.

II. PLAINTIFF IS ENTITLED TO NO RELIEF UNDER N.J.S.A. 10:5-12(A)

The cited statute precludes discrimination in employment. Dale was a volunteer, not an employee. He received no remuneration or benefits. He did not work for BSA. His efforts were devoted to the boys in the troop. BSA issued his "commission" which gave him the authoritative position of assistant scoutmaster. It did so on the recommendation of the unit committee and Monmouth Council—neither of which would have done so had they been aware that he was a sexually active homosexual. *Graves v. Women's Professional Rodeo Organization*, 907 F.2d 71, 73 (8th Cir. 1990).

N.J.S.A. 10:5-12(a) must be read in conjunction with the legislative purpose expressed in N.J.S.A. 10:5-3, that is, to prevent "personal hardships" such as "economic loss; time loss. . . . or other irreparable harm resulting from the strain of employment controversies" for which there are "legal remedies including compensatory and punitive damages".

The invidious discrimination against an individual precluded by N.J.S.A. 10:5-12(a) is that which affects "compensation or . . . terms, conditions or privileges". None of that applies to Dale.

Plaintiff has no cause for action under the statute.

III. PLAINTIFF IS ENTITLED TO NO RELIEF UNDER N.J.S.A. 10:5-12(l).

The cited statute precludes discrimination based on a refusal to do business with any other person on the basis of, inter alia, "affectional or sexual orientation." BSA was not doing business with Dale. It simply commissioned him as a volunteer adult assistant scoutmaster. There was no

contractual relationship—no quid pro quo. There was a unilateral authorization by BSA that allowed Dale, as a volunteer, to act as adult mentor for a specified time period to a patrol of scouts assigned to him for guidance and tutelage—nothing more. *Curran v. Mount Diablo Council of the Boy Scouts*, 29 Cal. App. 4th 192, 29 Cal. Rptr. 580 (1994) *rev. granted* 31 Cal. Rptr. 126 (1994); *Seabourn v. Coronado Area Council*, 891 P.2d at 403.

Plaintiff has no cause for action under that statute.

Therefore, for the foregoing reasons all relief sought by plaintiff is denied.

IV. THE DEFENSE OF FREEDOM OF EXPRESSIVE ASSOCIATION

In *Roberts v. United States Jaycees*, 468 U.S. 607, 82 L.Ed. 2d 462, 104 Sup. Ct. 3244 (1984) Justice Brennan developed the concept of First Amendment protection of a group's right to freedom of expressive association in the following fashion (beginning at 104 Sup. Ct. 3252) (citations omitted):

> An individual's freedom to speak, to worship and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were also guaranteed.
>
> * * * *
>
> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.
>
> * * * *
>
> Consequently, we have long understood as implicit in the right to engage in activities protected by the

First Amendment a corresponding right to associate with others in pursuit of a wide variety of political social, economic, educational, religious, and cultural ends.

* * * *

Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may . . . Try to interfere with the internal organization or affairs of the group.

* * * *

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore, plainly presupposes a freedom not to associate.

* * * *

The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

In her concurring opinion, Justice O'Connor, refined the concept in the following fashion (p. 3258 Sup. Ct.):

> . . . an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual. Protection of the association's right to define its membership derives from the recognition that the information of an expressive association is the creation of a voice, and the selection of members is the definition of that voice. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." (citations omitted)

And at (p. 3259 Sup. Ct.):

> In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the market-place of ideas.

Determining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive. It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service.

* * * *

> Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvment. (The footnote reference for this is the Girl Scout and Boy Scout Handbooks).

The court was unanimous in holding that the State of Minnesota through its legislative power as interpreted by its Supreme Court could vitiate a by-law of the Jayees excluding women from voting membership based on a finding that the Jaycees was essentially a commercial association.

A similar result was reached in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L.Ed. 2d 474, 107 S. Ct. 1940 (1987). Both the California appellate court and the Supreme Court were of the opinion that the California law against discrimination based on gender, vitiated Rotary's by-law limiting membership to men and that, based on its essential business-related nature, Rotary had no freedom of expressive association right to be constitutionally protected in that regard. The State's "compelling interest in eliminating discrimination against women" (a goal not related to the suppression of ideas) prevailed.

In the language of Justice O'Connor in the *Jaycees* case, Rotary, too, fell into the category of a "predominantly commercial association".

In *New York State Club Association v. City of New York*, 487 U.S. 1, 101 L.Ed. 2d 1, 108 Sup. Ct. 2225 (1988) the focus was somewhat different. The New York City Human Rights Law had an anti-discriminatory provision containing language which parallels that of N.J.S.A. 10:5-12(f). As originally enacted, it provided an ex-

emption for "any institution, club, or place of accommodation which proves that it is in its nature distinctly private". Thereafter, that exemption was amended to affirmatively extend anti-discriminatory coverage to any "institution, club or place of accommodation (that) has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business." It is further provided that any such club "shall not be considered in its nature distinctly private". The plaintiff, consortium of private clubs, challenged the amendment as violative, on its face, of First and Fourteenth amendment rights of "private" clubs.

Relying on its *Rotary* and *Jaycees* opinions the Court rejected the facial First Amendment challenge. It left open the possibility that an individual club might litigate the question on an "as applied" basis.

The facial Fourtenth Amendment challenge was based on an equal protection argument stemming from the exemption of clubs "distinctly private" in nature. For similar reasons that argument was given rather summary disposition.

That case has no precedential value for this case save for the concurring opinion of Justices O'Connor and Kennedy as well as that of Justice Scalia which were sensitive to the First Amendment rights of expressive association held by other organizations. For the purposes of this case we are left, then, with the guidance provided by *Roberts* quoted above.

No discussion of appellate court sensitivity to the rights of certain organizations to protected freedom of expressive asssociation would be complete, here, without reference of *Leeds v. Harrision*, 9 N.J. 202 (1952).

The defendants in that case were the board of directors of the Young Women's Christian Association (YWCA) of Atlantic City, a corporation organized in 1915 as an "association not for pecuniary profit."[13] The certificate of incorporation states the purpose as "the improvement of the spiritual, intellectual, social and physical condition of young women." It originally provided for a governing body of five trustees. At the time the litigation commenced it appears that the number of trustees had increased and that the trustees had provided in the By-Laws for a board of directors and officers.[14] A board of directors was authorized by N.J.S.A. 16:19-3. It could consist of 8 or more. Those directors together with the president of the association then constituted the board of trustees.

The constitution, duly adopted, stated the purpose as the association of "young women in personal loyalty to Jesus Christ as Savior and Lord; to promote growth in Christian character and service through physical, social, mental, and spiritual training and to become a social force for the extension of the Kingdom of God."

The By-Laws divided membership into "Active" and "Associate" categories. Only active members could hold office and vote. "Active" was defined as "those who subscribe to and will support the purpose and who are members of Protestant Evangelical churches." "Associate" members are those "who wish to identify themselves in interest and service for the Association."

---

13 Although incorporated under the predecessor of N.J.S.A. 15:1-1 et seq., as the court noted in opinion, the legislature had clothed YWCA with all of the benefits and privileges accorded by the corporations and Associations, Religious Act, N.J.S.A. 16:19-1 et seq.

14 Part of the relief sought by plaintiffs was abolition of the board of directors and reduction of the number of trustees to five as provided in the original certificate of incorporation.

The constitution and by-laws also required that a confession of the religious faith and beliefs be a condition of membership. Although affiliated at one time with the national federation of YWCAs, the defendant, in 1949, had disaffiliated itself precisely because the federation had departed from the principles and beliefs which it had once shared in common with defendant.

The court had no difficulty in understanding the reference to "Protestant Evangelical churches."

> Evangelical faith signifies full acceptance of the Gospel. The standards of doctrine of Protestant evangelicalism are embodied in the Apostles' Creed and Gospels. We have been referred to the dictionary for the terms of classification and the definitive characteristics and differences. "Evangel" means the message of news of the Christian dispensation and the redemption of mankind through Christ as revelation of the grace of God; hence, one of the four Gospels. "Evangelicalism" signifies belief in the Divinity of Christ and conformance to the spirit of the Gospel and the teachings of the New Testament—a school among the Protestants which holds that the essence of the Gospel consists mainly in its doctrines of man's sinful condition and need of salvation, the revelation of God's grace in Christ, the necessity of spiritual renovation, and participation in the experience of redemption through faith. See "evangel" and "evangelical" in Webster's New International Dictionary, 2d ed. Evangelical belief includes acceptance of the mystery of the Holy Trinity; hence, it differs fundamentally from the Unitarian theology which rejects the Trinity and holds that God exists only in one person, and also sustains the right of private judgment in theological matters. Thus, a by-law conditioning membership upon adherence to

> the articles of Christian faith expressed in the Apostles' Creed and the doctrines of the four Gospels would be in keeping with the essential object of the society. The very name assumed by the Association and the declaration of purpose made in the corporate charter plainly import an alliance of believers in the Trinity and the Divinity and teachings of Christ to serve the spiritual, temporal and social welfare of womankind. "Spiritual" has reference to the soul and the Divine Will and sacred things. It follows that the provision of the constitution limiting the voting membership to professing believers in the Christian faith, doctrine, worship and discipline comprehended in and practiced by evangelical Protestantism does not involve a radical and unauthorized deviation from the corporate charter of the defendant society.

The court found such requirement for membership to be within the legislative corporate grant.

The plaintiffs were 12 women non-members. They sought a mandate from the court to direct the association to accept them into membership free of any condition or requirement that they "be members of any particular Christian church or religious sect" or that they "subscribe to any statement of faith or dogma" and also to compel abolition of the board of directors and reduction of the board of trustees to the original number of five set forth in the corporate charter; to revise the constitution and by-laws accordingly and thereafter conduct a new election for trustees for which the distinction in active and associate membership would no longer exist.[15]

---

15 The association had denied active membership but had tendered associate membership to plaintiffs. That had been refused.

It is of interest to note that at the time that litigation commenced, the NJLAD had been enacted L.1945 c. 169 and had taken effect on April 16, 1945. One of the prohibited grounds of discrimination was that based on "creed". However, that possible avenue of relief was not explored by the plaintiffs in the *Leeds* case.

The court upheld the defendant Y.W.C.A.'s constitution and by-laws and dismissed the complaint. In so doing it first distinguished between religious societies and quasi-religious societies (p. 214).

> While Young Men's and Young Women's Christian Associations are not formed for public religious worship and exercise no ecclesiastical control over their members, *in New Jersey such societies are deemed impressed with a "religious use" and therefore quasi-religious in the view of the law.* The Legislature recognizes a kinship and identity between religious societies in the strict sense and associations of the particular class. There is sufficient similarity in spiritual conception for a common classification. (Emphasis supplied)

And (at p. 215-6)

> There is an essential and readily discernible difference between a voluntary association of persons grounded in common religious principles and beliefs for charitable and benevolent purposes and the corporation formed to govern the society's temporalities; and judicial interposition may not be had to work a basic alteration of the bond of association in disregard of the rights of those who hold membership on the faith of common adherence to the fundamental creed and polity. *III Stokes' Church and State in the United States*, p. 376. Questions of re-

ligious faith and doctrine are left to the society itself. This policy of the civil jurisdiction is founded in the constitutional freedom of religion and liberty of conscience. Generally, judicial intervention is justifiable only where the complaining parties have suffered an invasion of their civil rights, of person or of property . . . (citing cases). Such religious and quasi-religious societies are the same footing as other voluntary associations for benevolent purposes: all "who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." *Watson v. Jones*, 13 *Wall.* 679, 729, 20 L.Ed. 666 (1872). Such "religious societies are regarded by the civil authority as other voluntary associations, the individual members and separate bodies of which will be held to be bound by the laws, usages, customs, and principles which are accepted among them, upon the assumption that in becoming parts of such organisms they assented to be bound by those laws, usages, and customs, as so many stipulations of a contract between." *First Presbyterian Church of Louisville v. Wilson*, 14 *Bush* 252 (*Ky. Ct. Apps.* 1878).

> The society's constitution is essentially conventional in character. The compact derives from the common consent of the parties, and is limited accordingly. It is a corollary that where, as here, there has been long acquiescence in a by-law prescribing qualifications of members, and the association is united in the principles and beliefs thereby laid down as the standard of membership, it is ordinarily not ground for judicial intervention that the by-law has unduly narrowed the field of action prescribed by the charter.

And further, (pp. 216-17)

> There is no reason in law or in equity why this fundamental limitation on the character and object of the society declared at the outset by its constitution and laws should now be overthrown for want merely of a specification in the charter of the qualifications of members. *A subversion of the principle uniting the membership for common action is beyond the judicial province. The common bond which underlies the compact is secure against judicial interference.* Such has been the motivating and cohesive force of this society from the beginning. And until now this fundamental tenet of the alliance has been free from challenge. *Religious and quasi-religious societies may adopt a constitution and laws for the regulation of their affairs, if conformable and subordinate to the charter and not repugnant to the law of the land*; and they are binding upon the membership until modified or repealed in due course . . . And *by their very nature, the right of membership is not a justiciable question.* (Emphasis supplied.)

Leeds v. Harrison spoke before *Roberts v. United States Jaycees.* It does not use in so many words the First Amendment right of "freedom of expressive association" yet the values expresed in *Roberts* echo the state court's rationale of judicial abstention from interference in the internal governance of the affairs of a quasi-religious organization to force a change in its requirements for membership. Had *Roberts* been in existence it would have been cited in support of the result. See the dictum in *Hurley v. Irish American Gay, Lesbian and Bisexual Group, etc.*, 115 U.S. 2338, 132 L.Ed.2d 487 (1995), in which the Court stated that: "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." 132 *L.Ed.* 2d at 496.

Further, in *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 34 (1966) the Court recognized that if a private club did "owe its existence to the associational preferences of its members" it would be exempt from NJLAD.

Youth membership in scouting is restricted to boys between 11 and 18. To become a member, each must submit a completed Boy Scout application and health history signed by his parents; each must repeat the Pledge of Allegiance; demonstrate the Scout salute, the Scout sign and handclasp and how to tie a square knot. Each, with his parents, must complete a child protection program; participate in a Scoutmaster conference and pay the national dues. Each must understand and agree to live by the Scout Oath, Law, motto, slogan and Outdoor Code.

Similarly, Adult Leadership is not open to the public. One must be a male citizen over the age of 21 (except, for assistant scoutmasters, over 18). He must possess the moral, educational and emotional qualities deemed necessary by BSA for leadership before he will be commissioned. He must be recommended by the Scout Executive and approved by the Local Council executive board. He must subscribe to the Statement of Religious Principle, the Scout Oath and the Scout Law.

Each troop meeting begins with the recitation of the Scout Oath and Law. On a regular basis there then follows a group discussion of various parts of the Oath and Law stimulated by the Scoutmaster or troop leader. Before the close of each meeting, it is the usual practice that the Scoutmaster offer the boys a moral lesson, known as the Scoutmaster's Minute.

At each level of advancement, the individual boy describes to his Scoutmaster or review board of adult leaders how he is living his life in accordance with the Scout Oath and Law.

Since its inception Scouting has sincerely and unswervingly held to the view that an "avowed", sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be "morally straight") and the Scout Law (whereby the person promises to keep himself "clean"). The exclusion or termination of an adult leader who openly advocates consensual homosexuality is no less rational than excluding one who advocates any other type of behavior (such as promiscuous heterosexual activity) which BSA holds to be morally wrong. The consequences of restoring Dale to a position of adult leadership would be devastating to the essential nature of scouting.

CONCLUSION

The Boy Scout movement is world-wide. Its founder, Baden-Powell, made its basic purpose the molding of the character of growing boys in such a fashion that at age 18 they could move into an adult world armed with strong moral principals for their own good and for the good of those around them. That noble ideal (which our society needs so desperately today) requires of them, as boys, a belief in God (the benevolent and loving Creator) and, through the Scout Oath, the Scout Law and the Scout Handbook an adherence to the Ten Commandments and the Golden Rule.

In the language of *Leeds v. Harrison*, BSA is a quasi-religious organization. As distinguished from *Leeds* it is a non-sectarian quasi-religious organization. It is not irreligious or religiously indifferent. It has religious beliefs which it upholds as intrinsic to its purpose. Adult leaders are critical to its mission. The By-Laws and Regulations

require careful selection and an affirmation commitment by the application to the Scout Oath, Scout Law and Statement of Religious Principal. They also provide for one year commissions to limit any harm which an inappropriate appointment could cause. The presence of a publicly avowed active homosexual as an adult leader of boy scouts is absolutely antithetical to the purpose of Scouting.

BSA and Monmouth Council are both organizations which have First Amendment freedom of expressive association rights preventing government from forcing them to accept Dale as an adult leader-member.

Accordingly, plaintiff's motion for Summary Judgment is denied. Judgment for no cause for action based on the cross-motion for summary judgment is granted.

Mr. Brown will submit the appropriate form of Judgment in accordance with R.4:42-1.

APPENDIX D

STATUTORY PROVISIONS

10:5-4. Obtaining employment, accommodations and privileges without discrimination; civil right

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

10:5-5. Definitions

As used in this act, unless a different meaning clearly appears from the context:

* * * *

l. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in

the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; and public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or postsecondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation, in the admission of students.

* * * *

hh. "Affectional or sexual orientation" means male or female, heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

* * * *